A PRACTICE OF American National Government

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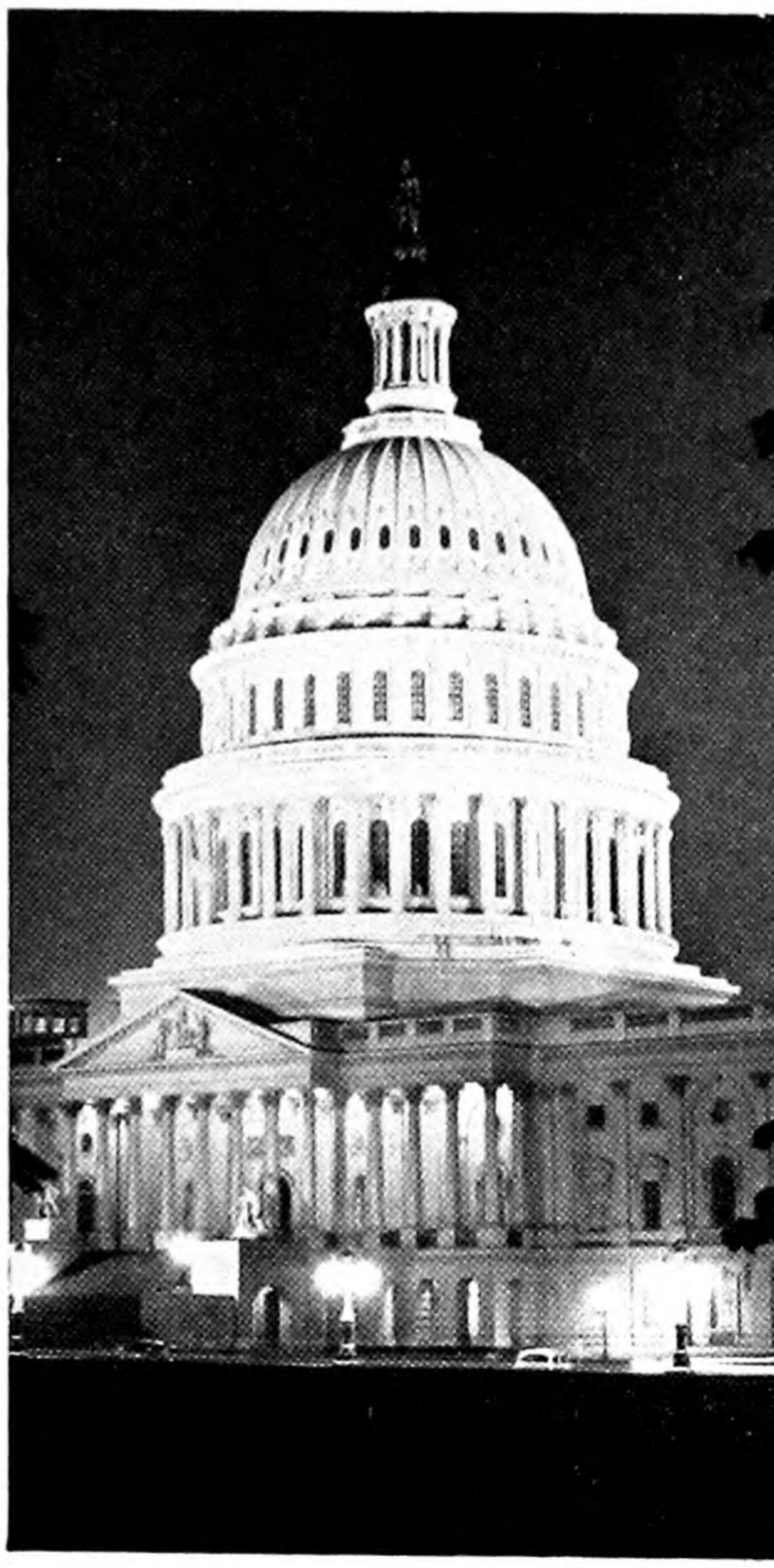
The Theory and Practice of

AMERICAN NATIONAL GOVERNMENT



EQUAL JUSTICE UNDER LAW

The Theory and Practice of

AMERICAN NATIONAL GOVERNMENT

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Preface

This book deals with the dynamics and the aliveness of American government as politics, law, and administration combine to give us government-in-action. The aim has been to portray not merely diverse parts of governmental machinery and isolated governmental activities but, rather, the integrated operations of our whole complex mechanism as it serves the even more complex needs of the American people. The primary subject, indeed, is activity rather than mechanism. Most divisions of the book therefore begin with the policies, the aims, the programs of government, and only after these are placed in their setting does the discussion turn to machinery to show how it is created or adapted to realize policies, aims, and programs. The emphasis is on the "what" and the "why" as well as the "how." I have tried to write a book of theory, or at any rate of theoretical inquiry, as well as a book of facts, in the hope that it would challenge all readers, and particularly the leaders of the oncoming generation, to speculate keenly about the nature of government and its rightful place in our society. If energetic people with their best years ahead of them can be persuaded intently to ponder the qualities of statesmanship, the respective merits of democracy and dictatorship, the phenomena of big government, big business, big agriculture, and big labor, and the position and responsibilities of the United States in the world today, then we shall have enlarged and vitalized the contribution of American education, improved the quality of American citizenship, and laid firmer ground for confidence in our future.

Although a society and its government are never static but are always moving and changing, the photographer or the analyst — depending on the figure — must stand relatively still at some chosen point if he is to present a clear picture or a clear analysis. For this book, the point that has been chosen is the period between 1947 and 1950. This was a period of rebounds and transitions in governmental programs. World War II had given way to a regime that was neither war nor peace but partook of the characteristics of both, becoming at the end more and more warlike as the cold war decreased in temperature, as conflict broke out in Korea, and as a major rearmament program got under way. It was a period of transition from war production to production for a peace economy and back toward war production again. The people were disturbed by fears of inflation, fears of deflation, and then fears of inflation once more. A tide of anti-administration sentiment had brought a Republican majority into Congress in 1946, but in 1948 a backswing returned Democrats to power in Congress and in

the presidency. The Roosevelt New Deal, no longer "new" but frayed by age and the chaos of war, was succeeded by the similar but paler-visaged or less potent Fair Deal, with Republican resistance reflected in attacks on alleged communism in government and on what was said to be disastrous government spending and mismanagement of foreign affairs. Pre-World War II isolationism had given way to broad internationalism, with isolationism again covertly rearing its head in the chaos of disputation about our relations with other countries. Within this period of search for stability and of continued turmoil I have tried to see American national government as a whole and to some extent in combination with state and local government, and to present it as an intricate, powerful, and overwhelmingly influential entity.

The obligations of any mature writer on such a subject are so widespread that only in broad gesture can he acknowledge them. Like Tennyson's Ulysses, he is a part of all that he has met. In expressing himself he inevitably expresses innumerable professional and journalistic colleagues and people engaged in actual government. I make no pretense that the citation herein of books and articles and government documents has adequately indicated my debt. Of the people who have made direct contributions, only a few can be mentioned. Of my colleagues at the Johns Hopkins University, Thomas I. Cook and James E. Russell read and helpfully criticized certain parts of the book. On innumerable occasions I have called on Malcolm Moos for facts and ideas. My more extensive local obligation, however, is to graduate students and former graduate students, many of them teachers of American government, who have listened to the reading of chapters and have commented freely on them. Of this group those who in addition have read chapters and talked with me about them include the following: Mary M. Clarke, Susan Dischka, Hubert S. Gibbs, Ronald F. Howell, Jr., John M. Martin, Jr., Eva M. Redfield, Christopher Van Hollen, and Charlotte Williams. My wife, Idella Gwatkin Swisher, read and criticized many chapters and prepared the reference lists. For efficient service beyond the range of professional duty I am indebted to the library staff in the social sciences at the Johns Hopkins University, and particularly to Beatrice Blakslee and Margaret Lough. Florence Mullin Turner and later Edna L. Fulton carried the burden of typing along with the routine work of department secretary, and Mrs. Fulton aided in preparation of the index. Members of the editorial and art departments of the Houghton Mifflin Company not only assumed the normal responsibilities of the publisher but selected illustrations and relieved the author by taking over other tasks. To all these people I express my deep appreciation.

CARL BRENT SWISHER

THE JOHNS HOPKINS UNIVERSITY

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PART ONE ⋆ *Political Organization*

1

The Stuff of Government

Modern government pervades all of man's life. It presides over his entrance into life and his exit from it, and over the broad course and innumerable details of the years between. Before the birth of the young American citizen it is important that his mother and father shall have been married according to the laws of the state; otherwise he will not only suffer social stigma but will find barriers in the way of inheriting property from his parents. The government which requires marriage as a condition of unstigmatized birth also requires that the physician attending the arrival of the newborn child send a notice of the birth and the names of the parents to a specified governmental agency. The governmental record is important thereafter in connection with the new citizen's attendance at school, his inheritance of property, his military service, his right to a passport and to protection by his government when abroad, his participation in the federal social security program, getting an industrial job in wartime, and many other matters. Long after his birth certificate is filed, if the subject lives out his three score years and ten, another physician issues for the same or another governmental agency another certificate, this one testifying to his death and its causes. Thereafter his body is disposed of subject to governmental provisions for burial or cremation, and government has a hand in the distribution of his property, usually taking for itself a substantial share.

Government is so much a part of our lives that we tend to take it for granted, just as we take pretty much for granted the air we breathe, the water we drink, and the food we eat. We become conscious of the air when it is unusually cold or hot, or when the wind blows strong or carries poisonous fumes, as it did a few years ago over a Pennsylvania town. We become conscious of water when it comes in destructive floods, when a serious shortage is threatened as it was in New York City in early 1950, and when it becomes the bearer of deadly germs. We become conscious of the food supply when there is too little of it, when it is badly distributed, or when it has been processed in such a way that it poisons rather than nourishes our bodies. In similar fashion we generally ignore the all-pervasive character of government. We become conscious of it when the traffic officer stops us on the highway, when a court settles a dispute between us and our

neighbor, when we are caught in the mechanisms of waging war, and when we receive unemployment compensation and old age assistance.

Yet unconscious as we usually are of the infusion of government into all that touches our lives, a moment of reflection brings awareness. In a letter to the author a friend recently remarked that "the pervasiveness of government occurs to me with renewed freshness every now and then, and always as if it is a new discovery." He illustrated as follows:

> In the past five days my wife has taken both a written and a practical examination to get an operator's license, and I have gotten an operator's license by transfer and two new licenses and titles for the company car and our own; we have argued in town meeting about paying fees for those who go outside our school district, discussed building shelters for the school children, conferred about garbage collection, the water supply, and more effective fire prevention (we volunteer here, and trot out often enough too); called on a neighbor whose children were quarantined for scarlet fever; paid taxes on gasoline, cigarettes, alcohol, our house and property, and prepared to pay taxes on my income to both state and nation — meantime being subject to tardy dinners because Mrs. H—— was working on a program for the League of Women Voters and collecting for the Red Cross — and read in press and magazines about socialized medicine, federal aid to education, the E.R.P., and national and international affairs generally, an astonishing number of them very close to our small family and its life.

For most people it is one of the marks of the successful operation of government that most of it can be accepted unthinkingly, that it does not require the detailed attention of all citizens. Government exists not to take all the time and attention of the people, but to make it possible for the people to lead the kind of lives they want to lead — so far as fulfillment of their desires is not inconsistent with the rights of their neighbors. Yet, for the sake of the people, government must be analyzed from time to time in all its operations.

Part of the checking on government is done within government itself. In the federal government, for example, Congress and the President check on each other and both in turn are subject in some matters to check by the Supreme Court. Within the executive branch of the government, which the President heads, the top department officials check on subordinate officers and those in turn on their subordinates, and so on down the line to the lowliest workers. Legal staffs are maintained throughout the government to see that government is administered according to law. Auditing staffs are maintained to see that funds are spent only as the law provides. In various other ways in the federal, state, and local governments, inspection and restraint of one part of the system by another keeps government operating in its proper channels.

Yet in a democracy not all inspection of and checking on government can be left to employees and units within the government itself. The essence of democracy as we know it in the United States is government *by* the people. Although individuals busy with their own affairs cannot give all their time to watching government and proposing changes in it, the people

themselves must be the final inspectors and the final judges of what their government does. If they are to exercise their power of governing, whether through voting in elections or in other ways, they must be able to drop their personal affairs for the moment and rather quickly reach a basic understanding of the problems of government at the time. A major purpose of government courses in American colleges and universities is to give young people the basic knowledge of government which is a necessary background to active and intelligent citizenship. That basic knowledge consists not alone of information about governmental machinery but also of the ethical standards which the people wish to apply to governmental activities. It includes knowledge of the characteristics of people which make it easy to govern by some techniques and impossible to govern by others. It includes awareness of the fact that government, instead of being a thing apart, an entirely separate entity within society, is an integral part of the lives of the American people, with the diverse characteristics which attend the people themselves.

People in different positions inevitably see government from different points of view. To the government worker it is an employer, the source of salaries and wages. To the soldier and sailor it is the absolute ruler, the supreme commander. To the public utility magnate it is the usually unwelcome regulator. To the criminal it is the arm of punishment. To the man with a large income it is both the protector of property and the ruthless tax gatherer. To the man in the street with no sharp point of contact with it, it is likely to be a hazy something in Washington or at the state capital or the county seat or the city hall. To the college student it can easily become even less than this — little more than "something in a book." This, emphatically, government is not. Although books provide the key to an understanding of government, government is not a bookish subject. Government uses statute books, case books, books of statistics, and innumerable books of other kinds; but books are merely the instruments of government. The essence of government is the organization and policing of human behavior. It is the use of power, of the power which is built up to a high potential by organizing people and consolidating their strength in order to mold the conduct of a society as a whole.

SEARCH FOR THE REALITIES OF GOVERNMENT

Method of Approach. However accurate a series of abstract statements about government may be, the writer who frames them is often frustrated by the difficulty of making them come alive in the minds of his readers. In his provocative book, *The Republic*, published in 1943, the late Charles A. Beard took not only his title but also his method of writing — the method of dialogue — from the profoundly influential writer, Plato, who lived in Athens in the fourth century B.C. In his rural home in the vicinity of New Milford, Connecticut, Beard not only produced a stream of significant books on American government but also carried on rich and stimulating

discussions with the many people who visited him there. Using a series of fictitious characters in discussions of our republic, Beard captured the vitality he wanted for his book.

No such device is feasible for a book which will range as widely over the field of American government as the present study. A much modified version of it is possible, however, to illustrate briefly the omnipresence of government in the lives of people, and more specifically in the lives of people in the age group of most readers of this book. We shall detail the experiences of a class in American government, and a particular member of that class, in discovering on the morning of a single day the various ways in which government had some impact on his life. The setting is a branch of a mid-western state university in a city of 100,000 people called Central City, which can be labeled Central State University. Dissatisfied with the lack of real awareness of government in his students at the end of the first term, Professor Wheeler announced for the second term a project to be undertaken out of class: a record of individual experiences with government functions, to be followed by additional papers discussing the significance of these findings, using information and ideas from all available sources. The paragraphs which follow trace the experiences of just one student.

One Hour With Government. On the morning of February 7, John Chester Martin was awakened promptly at eight o'clock by a new alarm clock he had bought to end his tardiness record at the university. As he turned off the alarm, John wondered irritably why the twenty percent tax he had paid to the federal government on the clock should be called a "luxury tax." Planning this portion of his report the night before, he had reminded himself to say that it was 8 A.M. not by decree of the solar system or the Supreme Being but of man-made law. Central Standard Time in this area was not peculiarly "God's time," as members of Congress had been known to call it when debating the advantages and disadvantages of so-called daylight time. It was international agreements and federal statutes, and not specifically the Deity, which decreed indirectly that when it was 8 A.M. in Chicago it should be 9 A.M. in New York.

Climbing out of bed, John went to the bathroom, where he bathed in water provided and purified by the city government; he was allowed to use it freely, since there was no local shortage as in New York City, where the city government was urging voluntary restrictions on the people and talking of legal enforcement. The water flowed through pipes which had been installed pursuant to the city plumbing code by a licensed plumber and had been checked by a city inspector. The hot water came from a furnace similarly installed and inspected. Waste water passed down the drain into a sewage system provided by the city. John shaved with an electric shaver on which a luxury tax had been paid. The electricity which drove the shaver was provided by a local public utility with rates fixed by a state regulatory commission. The local electrical company had purchased the electricity

from a distributing company which was licensed by the Federal Power Commission to generate electricity at a dam built in a navigable stream.

Back in his room, John turned on the radio for the news while he climbed into his clothes. His clothes had been manufactured by workers who were protected by safety laws enacted by the state legislature; their right of collective bargaining was assured by the federal Labor-Management Relations Act — better known as the Taft-Hartley Act — and protected by the National Labor Relations Board, and their minimum wages were assured by the Fair Labor Standards Act and protected by a federal administrator. The radio station which John tuned in had been licensed by the Federal Communications Commission; it used a wave length assigned and a power dimension prescribed by the commission.

The radio program had a variety of government news. The President had intervened in an attempt to end a coal strike. A federal conciliator had asked postponement of a threatened telephone strike. Senator Tydings, of Maryland, had asked the President to call a world disarmament conference to "end the world's nightmare of fear" with respect to atomic weapons. The Republican party had issued a statement of policy as part of its plan for winning 1950 elections to Congress. The United States High Commissioner in occupied Germany had warned the Germans against the revival of nazism. New facts were presented about Klaus Fuchs, a British naturalized citizen who had confessed to giving atomic secrets to the Soviet Union. A new French cabinet had been organized. Japan was seen ready to give military bases to the United States. The Department of Agriculture had announced a program for fixing milk prices. The Supreme Court had handed down a new series of decisions with certain justices dissenting. A lawyer, sentenced for contempt as a result of his misbehavior in court, had appealed to a higher court. Various items of local news came at the end of the broadcast.

Hurrying downstairs, John saw his mother looking at a new Oriental rug on the living room floor, with obviously mixed feelings. He knew what was disturbing her. The rug was beautiful and colorful; it gave tone and liveness to the room. Yet the base value of the rug, capped by the amount of import duties collected by the federal government and the sales taxes of the state and the city, made the cost uncomfortably high for a family with a middle class income. Furthermore, Mrs. Martin had pretty much lost interest in home decorations after her family was reduced from five to three. John's sister, Margie, had gone to England as a "Wac" during the war and had become the wife of a Labor member of Parliament. Her visit home had been postponed because she was needed with her husband during his campaign for reelection, and his party was writhing under criticism of Winston Churchill and his Conservatives. But it was the absence of the older brother, Joe, that was most distressing. After going almost all the way through the war without injury, Joe had crashed with his plane a few days before the surrender of Germany. Now what was left of him was in the veteran's hospital out Maple Street.

John's father was reading at the dining room table. Middle aged and distinguished, he was United States attorney for the federal judicial district in which Central City was located. He had recently won local fame by the way he had handled the prosecution of a man accused of murder in connection with robbery of the post office. He had asked for a verdict of murder in the first degree and had gotten it. He had asked for the death penalty and had gotten that too. He did not especially like criminal work. He would have preferred cases like the pending suit under the anti-trust laws to break up a combination of steel companies. Unfortunately it would endanger his political career if he handled that case himself. A. Z. Brown, chairman of the board of the Central City Steel Corporation, was his good friend and one of his principal sponsors. To attack him from the office of United States attorney would show ingratitude and cut off support for the coming congressional election. The assistant attorney general in charge of the anti-trust division of the Department of Justice had understood the situation and had agreed, as he so often did in such cases, to send out a special assistant to handle the case.

His mind on the governmental connections of everything he touched and saw, John sat down muttering the words of a recently popular song with a refrain ending with "a lot of coffee in Brazil." The importation of the coffee was controlled in part by federal tariff legislation and in part by a treaty between the United States and Brazil. The sugar had probably been imported from Cuba pursuant to a contract between Cuba and the United States which provided for a specific tonnage allotment to this country; it might, however, have been grown in Colorado with a minimum price guaranteed by the federal government. It was refined and offered for sale under the provisions of federal pure food and drug legislation. The cream came from a state-inspected dairy and was pasteurized as required by state law. Its price was fixed under a marketing agreement supervised by the United States Department of Agriculture. The toast came from wheat grown subject to production quotas worked out under the supervision of the Department of Agriculture. The bread had been sliced from a loaf of the weight prescribed by state law. The bacon had been processed pursuant to the federal Packers and Stockyards Act and shipped in interstate commerce under the provisions of the Meat Inspection Act and the Interstate Commerce Act. The eggs had been graded as required by state law.

While breakfasting, John scanned a newspaper which enlarged upon the items mentioned on the radio and added others. The paper had been shipped from an adjoining state subject to congressional regulations of interstate commerce. Because it moved in interstate commerce and gathered news in interstate commerce, its workers — even including the editorial writers of the Associated Press — were protected by the Labor-Management Relations Act. John also looked over the mail just then delivered by the postman, noting therein a receipted tax bill addressed to his father.

Because John's father had to take the family car down town for the annual motor vehicle inspection required by the state, John had to take the

bus out to the university. As he went out the door he glanced at the house across the street where Sheila Adams lived, but the diphtheria quarantine sign on the door reminded him that because of her sister's illness Sheila would not be going to the university with him. He hurried down a city-paved sidewalk and through a city-owned park which had a fountain constructed during the New Deal period by the federal Works Progress Administration; that agency was then providing public work projects to relieve unemployment. Park statues stood as memorials of three major wars. On an adjacent street paved by the city with the aid of federal funds, John caught a bus for the university. The fare had been fixed by a state regulatory commission. The bus was licensed by the state and a state inspection certificate was attached to its windshield. The operator had a driver's license from the state. The bus used gasoline on which state and federal taxes had been paid.

The bus passed a bank which had been chartered by the federal government and was a member of the Federal Reserve System. It passed many stores which had been licensed by the city, filling stations which stored and sold gasoline subject to city regulations, a branch post office operated by the federal government, and innumerable structures ranging from individual homes to apartment houses and factory and office buildings which had been constructed pursuant to state laws and city ordinances. It left John at the curb opposite the university. As he entered the campus a group of airplanes flew overhead, evidently from the field maintained by the Department of the Air Force five miles outside the city.

The first assignment of the students' research project ended with an appraisal of the class itself. John had been told that between five and a half and six million people out of the total of approximately 60,000,000 people gainfully employed in the United States worked for some government in some capacity. As he entered his American government classroom just before 9:00 o'clock, he looked at his fellow students with the thought that they, as college people, would seek government employment even in a higher percentage than people generally. He wondered if one out of every five or six of those around him, or perhaps even more than that, would some day be drawing government checks. At any rate, all of them would receive protection from government every day of their lives. Directly or indirectly, all of them would pay taxes. Some of them would render military service. Some would derive benefits from the social security program. Of those in private employment, many would perform duties connected with their employers' relations with government. Some would travel on government passports. Most of them were or would be married according to legal forms, and would bring up children under the varied requirements of law. Some would probably be divorced. Out of the group someone was likely to spend time in a government poorhouse, prison, or hospital for the insane. Whatever the varied characteristics of their lives, all their lives would be pervaded by government.

SIGNIFICANCE OF GOVERNMENT IN DAILY LIVING

It is one thing to note our contacts with government but quite another to state the significance of those contacts. With the miscellaneous reports of all his students before him, Professor Wheeler asked the class to think as carefully as possible about the meaning of their experiences. He suggested that they read as widely as possible, that they talk among themselves about their reports, that they consult with other teachers, and that they make use of their families and friends in working out additional papers. He then posed this series of questions for student reflection:

Is it true, as sometimes said, that the essence of government is power? If so, what kind of power is it? Is it partly or altogether the kind of power generated at a waterfall or derived from the pressure of steam? How important is cooperation in the functioning of government? To what extent is the cooperation voluntary and to what extent coerced? How important is it that what government does be generally regarded as *right*? What is the place of compromise in effective government? What is the relation of personal, family, professional, and national loyalties to the operations of government? What is the thing called "law" which government enforces? How important is the pattern of the human machinery of government, as distinguished from the activities of the government? What is the basis of the constant preoccupation of government with property in some form?

Government as Power. In what sense could the essence of government be described as power? If the essence was power, was it the same kind of power as that of an internal combustion engine or an explosive bomb? In certain fields John found a very close relation. Important as other considerations had been, the United Nations had been victorious over the Axis nations primarily through the use of bombs and guns. Japan had surrendered when it did to avert more horrible experience with atom bombs. The effectiveness of the United States government at home during the war had derived in great part from its control of the mechanical instruments of industry and transportation and the raw materials for production of the mechanical instruments of war. Without mechanical power we should have been helpless before our enemies.

Yet to John the power inherent in weapons and machinery did not fully explain the power of government. It did not fully explain why the driver of a speeding car became docile and obedient when a traffic officer sounded a siren. It did not fully explain why millions of people went through the painful process of paying taxes. It did not explain why all the people in a given area should accept it as a fact that a given moment should be labeled 8:00 A.M. It did not fully explain why people in the United States freely accept the requirement that they drive on the right hand side of the street and not the left, or why they accept the mandate that certain streets shall be one-way thoroughfares. It did not explain why under certain circumstances people submit to punishment for doing acts of violence and

under other circumstances engage in organized violence, in war, at the behest of government or are punished for refusing to do so.

The Power of Unity. John found part of his answer in a hint dropped by his grandfather. "Take a look at Æsop's fables," the old gentleman suggested, "and look particularly for one called 'The Old Man and His Sons,' about the bundle of sticks which could not be broken."

Reflecting upon the fable, John sensed that part of the power of government was the strength of union. It was the ability and the willingness of many people to stand together, whether in waging wars or maintaining internal order. It was not so much the police force of Central City that kept traffic moving according to the rules as the willingness of most people to accept the rules without challenge. When all the people including policemen paid taxes, it was not primarily the power of the police that made them do so. The power of the police which was exercised over recalcitrant persons was not a product merely of firearms but of the agreement of most of the people that all of them must act in a certain way — must pay taxes as they were assessed, must obey law as it stood on the statute books. The power involved in prosecuting a man for murder committed while robbing the United States mail was the power of a united people, of an agreement among the people that the mail must be secure and that those who handled it must be protected.

What was the nature of the power exercised by President Truman in attempting to settle a coal dispute, or of the various powers exercised by other national leaders, governors, mayors, and other officials? It was primarily the power that consisted in having the people back of them. An Adolf Hitler without the support of the German people would have been just a paper hanger; a Benito Mussolini without Italian support would have been just a bellowing orator. The major source of their power was the support of their people.

Consent and Compromise. If apart from the mechanical power which government employed, the people are themselves the source of the power exercised over them, does this mean that most of them approve the details of the regulations they obey? Certainly some think that taxes are too high or that they are taxed unfairly. Some companies must think that the government-fixed rates on gas and electricity are too low, while many consumers must think them too high. Many of them must disapprove of traffic regulations, zoning ordinances, and other rules they are required to observe. Yet most of them do obey, knowing that society must have rules and that compromise is the price of order. Good government, John noted, does not require the complete submergence of all individual wills, but it does require eventual acquiescence in compromise decisions.

For evidence on the inner nature of government, John watched the attempts of the federal government to settle the then current coal strike. The President had to interfere in the coal strike situation because both the

coal operators and the mine leaders refused to work in good faith toward an acceptable compromise. When the President's fact-finding board got the leading opponents together for one more attempt at a settlement the operator spokesman quoted John L. Lewis as having said,

> You men own the mines; I have the men in the palm of my hand; what do you bid?

In so speaking he portrayed Lewis as setting himself up as a labor dictator. Lewis roared in reply,

> That is an infamous and deliberate lie. I said we represented the men. I say to you, George Love, you're a liar by the clock.[1]

While coal operators and leaders of mine workers are not particularly thin-skinned, they do not like to be called dictators and liars, particularly in public statements which will reach their "public." It was not surprising that the negotiations were unsuccessful. The threat of drastic action by the federal government was required to bring about a solution.

The impasse between the United States and the Soviet Union was of a much more serious kind. The Soviet Union was noted for the rigidity of its no-compromise attitudes. John's father reminded him of a 1947 pronouncement by Andrei A. Gromyko before a committee of the United Nations which was discussing establishment of a committee to serve when the major organization stood adjourned. "The word compromise," Gromyko declared, "is not in the Soviet glossary on this issue." [2] When the illustration was mentioned to John's English teacher, he called attention to the following lines from a poem by Carl Sandburg:

> In a Colorado graveyard
> Two men lie in one grave.
> They shot it out in a jam over who owned
> One corner lot; over a piece of real estate
> They shot it out; it was a perfect duel.
> Each cleansed the world of the other.
> Each horizontal in an identical grave
> Had his bones cleansed by the same maggots.
> They sleep now as two accommodating neighbors.[3]

The students sensed the possibility not only that no-compromise attitudes might bring strife in the coal fields but also that the United States and the Soviet Union might "shoot it out" with atomic bombs and other weapons hardly less destructive. .

While meditating the necessity for compromise and self restraint for individuals and groups, John read in a current issue of *Collier's* an article by Senator Paul H. Douglas about lobby groups in Washington. The motives of such groups, the senator said, were not bad. Often the ends they advocated were plainly good.

1. *New York Herald Tribune*, February 9, 1950.
2. *New York Times*, October 18, 1947.
3. Carl Sandburg, *The People, Yes* (New York: Harcourt, Brace, 1936), p. 12.

> But if every group is given all it wants, even all it needs, Uncle Sam will go broke; and the referee in bankruptcy is likely to be a dictator!

Unable to comprehend this fact,

> Men continue to organize themselves into pressure groups, demanding more and more of and from the national government, without waiting to consider the end result. They operate on the assumption that others will get the gravy if they do not.[4]

It was obvious that some degree of self restraint, some degree of willingness to share with others and to compromise in matters of dispute, is necessary if any government is to do its job.

The Sense of Loyalty. John's grief over his brother Joe and the collapse of his mother's life kept him thinking about government as it uses and perhaps destroys the lives of millions of young people in waging war. He came to the conclusion that young men do not go to war merely because they are drafted or merely because of intellectual agreement that the country ought to fight. It was clear that even his mother, grieved as she was over Joe's tragic condition, would not have wanted to hold him back in the time of the country's crisis. Just at this time the eyes of a horrified western world were on Klaus Fuchs, the German-born but British-naturalized scientist who admitted to turning over British and American atomic secrets to the Soviet Union. In New York the United States was proceeding with the trial of Judith Coplon, who was accused of conspiracy to turn over to a Soviet agent confidential information from the files of the Department of Justice. In the background were the trials of "Axis Sally" and "Tokyo Rose," American citizens who during World War II had broadcast programs from enemy radio stations to break down the morale of the American armed forces.

It was apparent, therefore, that in the twentieth century the sense of loyalty varied from individual to individual, as during the Revolutionary War it had varied from Nathan Hale, who grieved that he had but one life to give for his country, to Benedict Arnold, who sold out his country to the enemy. It was evident that there were some people who, while not lacking in personal integrity, had little feeling of national belonging but, in the language of a European woman who sought naturalization in the United States, only "a cosmic sense of belonging to the human family."[5] It was also clear, however, that for most Americans the sense of the "togetherness" of the American people runs deep, and that to them treason is the most loathsome of crimes.

Multiple Loyalties. John found in the events of that February evidence of other deep loyalties than those to the nation, loyalties which compli-

4. Paul H. Douglas (with James C. Derieux), "Big Grab at Washington," *Collier's*, Feb. 11, 1950, p. 20.
5. *United States* v. *Schwimmer*, 279 U.S. 644, 651 (1929).

cated the task of government. The United Mine Workers demonstrated a fierce loyalty in support of their chief, John L. Lewis, which took no account of the need of the country for coal. The coal operators demonstrated a similar preoccupation with the interests of their group and a similar lack of concern for the public welfare. A similar situation, although not so acute, prevailed on both sides in the threatened telephone strike. The combination of steel operators against which the government was taking action represented another group of loyalties different from devotion to the country as a whole. The proclamation of the Republican party by which it hoped to win financial support and votes also reflected loyalties narrower in scope than those attached broadly to the United States.

To John it was apparent that these group loyalties were not bad in themselves. It is good to have loyalty within a family, within a local community, within a business, and within a labor union. Since a measure of internal loyalty is necessary for the survival of any group, it is something to be nurtured rather than repressed. However, when people develop deeper loyalties to their narrow groups than to the country, the welfare of the country is endangered.

Rightness, Custom, and Law. As they worked back over the records of their varied contacts with government, John and his fellow students became aware of very close relationships linking the concern for rightness, prevailing customs, and the rules called law. They recognized, for example, that there is nothing inherently right and moral about driving on the right hand side of the street instead of the left. They knew, indeed, that in England the reverse practice was followed. Yet to insure order and safety in traffic, the custom of driving to the right has been sanctioned by state and local laws, and the people have come to think of this practice as not only expedient but "right." Rightness, custom, and law are in some way closely linked.

Again, the man brought to trial in the local United States district court for murder had been taken through a highly ritualized procedure. This procedure, which centuries ago developed in part out of the obsolete procedure of trial by combat, has become so well entrenched as the method of determining guilt or innocence that it is now justified at once in terms of rightness, custom, and law. Individuals and groups sometimes challenge its fairness. They oppose the browbeating of witnesses and the checking and heckling which prevent witnesses from telling all they know about the case directly and clearly. They question the ability of inexpert jurors to render adequate judgment on facts. By most people, however, the procedure is justified by its survival as custom out of ancient experience, and part of it is written even into the Constitution of the United States.

The Involvement of Property. Another fact of which the students became increasingly aware was the extent of the involvement of property in the varied activities of government. Taxation is a process of transferring prop-

erty from private owners to the government. The commissions which regulate the price of gas and electricity are regulating property. The regulation of transportation of all kinds is regulation of property. City zoning ordinances regulate the use of property. The manifold regulations for the construction and use of buildings are regulations of property. Industry, commerce, banking, enterprise of every sort, are subject to exercise of the power of government, and government is constantly preoccupied with them. More and more, government is concerning itself with national prosperity, and prosperity is thought of primarily in terms of property.

John then went to his father, who provided him with quotations about the nature of property which he had dug out of court decisions and other materials in the course of his law practice. One of them was from John Adams, the second President of the United States:

> The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.[6]

In Article X of *The Federalist*, which James Madison wrote in 1787 in argument for adoption of the proposed constitution of the United States, he alluded to the tendency of people to fall into animosities and argued that

> The most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.

John found the more conservative businessmen of Central City concerned about the invasion of property rights by what they called the "welfare state." When they spoke of the welfare state they meant government expanded beyond the earlier scope of its activities to promote the welfare of all the people by providing for security against unemployment and against want in old age, by providing medical care, better facilities for education, and various kinds of protection against recurrent depressions which endangered the economy. When government placed social welfare above the rights of property, they believed, the whole social order was endangered. They pointed with horror to the experience of Great Britain where whole industries were being taken over and operated by government with what they regarded as inadequate compensation to the former owners. They pointed with even greater horror to the Soviet Union, where private ownership and management of income-producing property was regarded as the source of all evil and where private ownership had been largely abolished

6. *The Works of John Adams* (1853), Vol. X, p. 8. Quoted by Justice Field in *Central Pacific Railroad Co.* v. *Gallatin*, 99 U.S. 727, 767 (1879).

and the major private owners liquidated. There was absolute conflict, therefore, between the fundamental assumptions of the Russians and American businessmen as to how economic matters ought to be handled.

Students who pondered this basic difference between the United States and the Soviet Union recalled a political speech in which Abraham Lincoln had proclaimed that the American nation could not permanently exist half slave and half free. The "irrepressible conflict" between the North and the South over the right to ownership in one kind of property, property in slaves, had come to a head in the Civil War. The North had won and had settled the question as a matter of law, but the nation was still paying the social cost of the war over three quarters of a century after it had come to an end. Did fundamental differences with respect to property rights have to result in the clash of arms? It was obvious that one of the major functions of government in the United States was settlement of differences about property without armed conflict.

The Dynamics of Society. As the students worked through the accounts of their experiences with government in search for the meanings behind those experiences, they returned to the point first discussed, the nature of the power which government exercises. Some of them thought that love of fighting lay back of it all and that almost all government was thinly veiled warfare, with the machinery of coercion kept somewhat in the background. In this connection Professor Wheeler suggested a search for the social philosophy of various military commanders and mentioned particularly a volume on General George S. Patton, commander of the victorious Third Army of the United States in World War II.[7] "Men like to fight," the lusty general proclaimed. Sophists and other crackpots who denied it, he added profanely, were either "fools or cowards."

John denied emphatically that he liked to fight, at least in the sense of dropping bombs on cities and wielding bayonets and flame throwers. He admitted, however, that he liked competition and the sense of winning, and that the victory over the Southwestern State football team had been worth his two weeks on crutches. He expected his political party to "put up quite a fight" to get his father elected to Congress, and he expected to help. He applauded the local police for their success in a "war against racketeering." If he followed his father into the legal profession he expected to "fight for election" as local district attorney at the earliest possible date. He would struggle to oust the opposing party machine and "fight" his way upward to the legislature, to the position of attorney general, and then perhaps to that of governor.

Upon reflection, therefore, John was willing to admit that the driving power of society, and therefore of government, was to be found within people. The dynamics of government was the dynamics of human desires and human determination. Government was an instrument for the fulfill-

7. Robert S. Allen, *Lucky Forward: The History of Patton's Third U.S. Army* (New York: Vanguard Press, Inc., 1947), p. 20.

ment of desires, not of isolated individuals but of the community or a large proportion of the community. It was an imperfect instrument, as all human instruments were imperfect. Incompetent or malevolent or selfish people in strategic positions in government might use the power of the people to frustrate rather than to fulfill community purposes. Yet by and large, in a loose sort of way, government survived and its use among men throughout the world was expanding because it met social needs, because it provided a mechanism through which the dynamics of human power could be released to achieve the ends of the people who provided the power.

The stuff of government, then, as seen by this group of students and by all of us, consists of many elements. One of them is power. The power element includes material dynamics over which man has achieved dominion by the development of machinery, but it consists also of the drives which come from people themselves and which yield social dynamics as people work together toward common ends. Cooperation is basic to the effective use of social power. It is basic to government. It implies the flexibility which makes possible the acceptance of compromise. Absolute rigidity has no place in any social system. Custom plays its part, though sometimes only a limited part, in determining what is acceptable to most of the people. A sense of rightness plays a similar part, and beliefs about rightness are likely to be broadly related to that which is at least in part customary. A showing of lawfulness tends to achieve acceptance, but it does so in part because rightness and custom and law tend to be inter-linked. Finally, because of the extent to which mankind depends on the material things of life, property is an all-engrossing subject of interest and is a major subject of control in most fields of governmental activity.

References

Max Ascoli, *The Power of Freedom* (Farrar, Straus, 1949).

Charles A. Beard, *The Republic* (Viking, 1943).

Adolf A. Berle, Jr., and Gardiner C. Means, *The Modern Corporation and Private Property* (Macmillan, 1933).

Francis W. Coker, *Democracy, Liberty, and Property* (Macmillan, 1942).

Alexander Hamilton, James Madison, and John Jay, *The Federalist* (available in many editions).

R. M. MacIver, *The Web of Government* (Macmillan, 1947).

Charles E. Merriam, *History of American Political Theories* (Macmillan, 1903).

Arthur Schlesinger, Jr., *The Vital Center* (Houghton Mifflin, 1949).

William G. Sumner and A. G. Keller, *The Science of Society*, 4 vols. (Oxford University Press, 1927–1928).

W. Lloyd Warner and Paul S. Lunt, *The Social Life of a Modern Community* (Yale University Press, 1941).

———, *The Status System of a Modern Community* (Yale University Press, 1942).

T. D. Weldon, *States and Morals* (McGraw-Hill, 1947).

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The Sphere of American Government

Government, then, is so much a part of our lives that we give little thought to its constant operations upon us; in order to study it as it is we must sensitize ourselves to manifold experiences with it which we ordinarily pass unnoticed. To study it in perspective, furthermore, we must change our mode of thinking about it in still other ways. People who live busy lives doing other things than thinking about government, and many government officials as well, assume that the existing governmental set-up is inevitable and fundamentally right. They assume either that government is always pretty much what they now find it to be, or that over the years it has been developing toward the maturity of the present day, after which it can be expected and permitted to change only in minor ways. Past revolutionary changes may have been necessary and the American Revolution is to be viewed with awe and reverence, but we need no more revolutionary changes. As President Calvin Coolidge is supposed to have said, "We have had our revolution!" [1] By and large people of such conservative outlook see the present social order and the present scheme of government as the poet's "far-off divine event to which the whole creation" [2] has been moving — or if not the institutions of the immediate present, then those of a recent period such as that just before World War II or before the New Deal, when taxes were not so high and when the government interfered less with business! They would like permanently to stabilize society and government at some such point.

In spite of all that government represents in the way of established routines, however, it never becomes completely stabilized. Societies change and their governments change with them. Any government at any given time is what it is partly because of varying factors in the society in which it operates. These factors include deeply rooted traditions, characteristics of populations, geography, kind and quantity of natural resources, and so on.

1. The author remembers this quotation from conversation during the 1920's but has been unable to find it in a published statement. He will appreciate direction to such a reference.

2. Alfred Tennyson, *In Memoriam*.

FACTORS CONDITIONING GOVERNMENT

Basic Traditions. Although traditions are constantly giving way before the impact of social changes, the traditions which prescribe patterns of government have great toughness. Is a nation accustomed to harshness and dictatorship or to democratic rule with consideration of the rights of the people? The ruthlessness of the Russian czars almost inevitably carried over to the so-called proletarian dictatorship of the Soviets. The Russians have a tradition, a set of intensely dictatorial ways of behaving in the government of their people, which continues to operate in spite of fundamental changes in their governmental structure. The English people, by contrast, have been accustomed for centuries to restraining the power of rulers, to government by the rule of law as contrasted with dictatorial rule. It is hard to conceive of imposing Soviet ruthlessness and harshness upon the British people without virtually destroying the people themselves. In this respect, of course, the American people inherit from the English tradition, but with emphases of their own which accent the value of individual liberty. The conceptions of the rightful sphere of government, of liberty, of justice, and of the good life, which are reflected in the traditions of any country, help to shape the activities of government in that country.

Population. The character of any government is determined in part by the character of the people governed. Is the population homogeneous, or is it sharply divided in terms of race, class, religion, economic interest, and other factors? Does the country have a high birth rate and a high percentage of elderly people? Are there too few people to develop the country's resources and to defend it against external enemies, or is the population adequate, or is there an excess population?

Although the population of the United States is largely a product of the European melting pot and is less sharply divided along many lines than our European forbears, it has racial divisions which vitally affect government. In the political sphere part of the North and part of the South are still fighting over the "freedom" of the Negro. Our immigration laws curtail the immigration of Orientals and other groups which might be hard to assimilate. While class divisions are less sharp than in most of our ancestral countries, divisions among income groups and between large employers and the mass of workers play a part in shaping the course of government. We are accustomed to thinking of our population as young, vigorous, and expanding. So it has been during our formative years. It has been venturesome and creative. In the years just prior to World War II, however, the birth rate was declining, the death rate was falling, and immigration was being held down. The rate of population increase was therefore declining and the average age of the people was increasing. As an aggregation of older people, therefore, it was feared that we might find ourselves becoming less imaginative, less willing to break with tradi-

tion, and less able to take care of ourselves in competition with younger and more rapidly growing populations such as that of the Soviet Union. It remains to be seen how much the rising birth rate of the post war period may affect the situation.

Although there has long been some opposition to continued immigration, we assumed until near the close of the nineteenth century that we needed more people to develop our resources and add to the general prosperity. In recent years, however, and particularly in times of depression, we have been worried about excess population, population which would have to be supported and yet would not be able to earn its living in our economic system. We have talked vaguely about a "mature" economy without knowing exactly what the term implied. To avoid adding to our total of indigestible population we have sanctioned arrangements for bringing Mexican workers into this country for doing particular jobs under contracts providing for their eventual return to their own country. At the same time we are concerned about estimates of a population of 200,000,000 people in Soviet Russia and about population increases and growing restlessness in other parts of the world because of population congestion.

Geography. Geography determines in part the conditions of government. Does the country have clearly defined natural boundaries or are the boundaries such that they are likely to be in perennial dispute? Is the country well protected against invasion by oceans, mountain ranges, and other natural barriers, or is it highly vulnerable? Is it in the position of a Poland that has been overrun and partitioned again and again, or in the position of a well-sheltered Switzerland? Is the climate torrid, frigid, or temperate? Is the soil well watered and fertile, or is it arid or swampy or lacking in fertility? Is the terrain level, or rough? What are the natural facilities for transportation?

The government of the United States has been vastly influenced by our isolation from the other thickly settled portions of the world. We have had broad oceans on our eastern and western frontiers and either weak or friendly neighbors to the south and to the north. After the War of 1812 we gave little thought to the prospect of hostile invasion until World War II, and we were only moderately concerned even then. In a temperate climate, we had a vast area of fertile land for exploitation. We had fine arteries for water transportation and adequate facilities for land transportation. We were in a position to develop and maintain a so-called free economy without giving a great deal of thought to matters of defense. It was only within the decade of the 1940's that the situation changed, not of course because of changes in our national boundaries but because of the development of the airplane as a fighting instrument and the development of rockets and guided missiles and atomic bombs. The geography which once gave us almost full protection is now far from an adequate shield, with the result that government must give a large share of its energies to national defense and must be prepared to control and utilize all resources in the event of war.

Natural Resources. Government is conditioned by the character and richness of natural resources, which were discussed in part above. What are the principal products of the soil? Where are their markets? What and how much must be purchased from other countries? What are the minerals available? What are the resources in water power? We know that much of the warfare between Germany and France has been over the rich manufacturing area lying between the two countries. We know of present difficulties in dividing Germany between the East and the West which result from the fact that the eastern region is largely agricultural while the western is predominantly industrial. We know that Great Britain has long held the position of a world power not because of rich resources in the British Isles but because her fleet made her mistress of the seas and brought her the resources of other lands.

The United States has been as nearly self-sufficient in natural resources as any great power, and most of those resources have been in the continental United States. True, we need foreign products in natural rubber, tin, bauxite for the manufacture of aluminum, and various other commodities, but the list of our needs has not been great by comparison with the needs of other countries. We could survive and prosper with only a minimum of outside help. We were not in great danger of having to make bad bargains with other countries which had resources necessary to our survival. We could bargain in a market where no one held a great advantage over us. It was necessary to trade with other countries in order to be prosperous but it was not necessary to trade in order to survive.

Yet contrary to the broad assumptions of the last three hundred years, we are now beginning to learn that the natural resources of the North American continent are not inexhaustible. We scraped the bottom of the barrel now and then as we dug up materials for the gigantic conflict of World War II. The supply of ore for steel and of various other minerals will not last forever. Our supplies of oil and natural gas, the accumulation of millions of years, face scarcity and perhaps exhaustion in a few decades. Our reserves in soil and timber are going fast. In these and other fields, therefore, government which during most of our history has done little more than aid in exploitation must now concern itself with conservation and perhaps with importation. The pattern of government must be readjusted in the light of new national needs. We must protect the riches we have against the possible depredations of others who have less than we or who, however much they may already have, may come to regard our resources as a necessary adjunct to their own. We must do all this for ourselves unless and until mankind builds up some kind of international organization to take over the functions of protecting property and preserving order throughout the world.

BASIC GOVERNMENTAL ACTIVITIES

Police Powers. At the basis of government as we know it in the United States is the prevention of what we regard as evil conduct. It is the exercise

of police power in the narrow sense of the term. It is the utilization of legislatures in making laws which forbid undesirable conduct and prescribe penalties for violation; of executive officers who take lawbreakers into custody and execute court decisions; and of courts which decide whether persons brought before them are guilty of the offences charged and which prescribe punishment by fine or imprisonment or occasionally by whipping or other means. It would be pleasant to think of our pioneer ancestors as self-restrained even though highly dynamic men and women, who required little in the way of restraint by the community. This is a pleasant fiction. One of the first steps taken in every immigrant community was to outlaw and provide penalties for acts of violence, sex offences, thefts, and other forms of undesirable conduct. The gallows, the jail, the whipping post, the stocks, the dunking stool, and other instruments of punishment played a prominent part in community life.

The same need for coercing good conduct by threat of punishment showed itself in new communities as civilization moved westward. The first community task was to provide "law and order," and it was often difficult. Western migrants included reckless people, adventurers, and criminal riffraff from more thickly settled areas. The settler sometimes found that he had to carry the law in his own holster. Sometimes the only respectable and effective way to settle a dispute was to shoot the other fellow. Criminal outrages sometimes drove communities to form vigilante groups to exterminate bandits and reestablish order. The ultimate goal, however, was establishment of government to take over all repression of criminal activities and to handle the punishment of criminals as a government monopoly.

Continuing Importance of Crime Prevention. The prevention of crime continues to be a basic responsibility of government. True, the rank and file of respectable citizens tend to lose sight of it. They have little awareness of hangings in the cold, grey dawn or midnight executions in electric chairs and gas chambers. Unless they listen to radio dramatizations or read of occasional prison riots they know little of life behind prison walls. Unless they are called for jury duty or have to appear as witnesses, they know little of the court room procedures by which guilt is determined and penalties are prescribed. Unless they are themselves the victims, they ordinarily know only from newspapers of the stream of violence which still flows through our society. It is in emergencies, or at any rate unusual situations of some kind, that problems of coping with crime come to the fore. The Civil War was followed by a long period of violence and disorder in the South, and by a linkage between business corruption and crime in the North. Political corruption and crime in American cities around the first part of the twentieth century was portrayed as "The Shame of the Cities." [3] From World War I until the middle 1930's gangsterism connected with the

3. See for example Lincoln Steffens, *The Shame of the Cities* (New York: McClure, Phillips and Co., 1904).

illegal sale of liquor and with rackets of many other kinds preyed on the American people. The social disruption caused by World War II has been characterized by the organization of gambling and rackets of various kinds over considerable areas and also by widespread hoodlum activities in the form of crimes of personal violence, often against women and children, which reflect not so much intent to rob as utter viciousness.[4]

Crime and the Federal Government. Crime in the United States has been traditionally a local matter and has been fought largely by local governments. The states have been to some extent involved, but until recently the federal government has been involved only in connection with basic federal functions such as delivering mail, collecting taxes, and regulating interstate commerce. More and more, however, combatting crime requires action by the federal government as criminal activities cross state lines and impinge upon expanding federal functions. The federal government inquired deeply into crime problems during the administration of President Hoover, who appointed for the purpose the National Commission on Law Observance and Enforcement, better known as the Wickersham Commission.[5] In 1934 "the fast-moving, violent gangster and racketeer, successor of the bootlegger, was the cause of concern, and resulted in the calling of a conference on crime."[6] In 1940 problems of national defence gave rise to the Federal-State Conference on Law Enforcement Problems of National Defense. In 1946 a National Conference on Prevention and Control of Juvenile Delinquency was held. In 1950, at the request of the American Municipal Association, Attorney General J. Howard McGrath called a Law Enforcement Officers' Conference to discuss federal coordination and cooperation with state and local agencies in coping with nation-wide gambling syndicates and other forms of organized crime which extended across state lines. The mayor of New Orleans and past president of the American Municipal Association stated the problem in part as follows:

> We do not have the whole picture, but each of us present — and hundreds of other mayors, public officials, and crime commissions in various States — have seen small segments of this national scene of organized interstate crime. These pieces fit together in a pattern of mounting evidence concerning several highly organized gambling and racketeering syndicates whose wealth, power, scope of operations, and influence has recently grown to gigantic and alarming proportions. It is an ugly, vicious, un-American picture of systematic law violation, huge profits, corruption of public officials who can be bought — and operations outside the jurisdiction of those who cannot be purchased.[7]

4. See for example Howard Whitman, "Nobody's Safe in Philadelphia," *Collier's*, December 7, 1949, and "Cleveland's Things Crawling in the Cracks of Sidewalks," *Collier's*, February 25, 1950. See also the article entitled "Hoodlum Empire," by Bob Considine, reprinted in the *Congressional Record* (temporary daily edition), March 1, 1950, pp. A1595–96.

5. For the final report of the Commission see *Enforcement of the Prohibition Laws of the United States,* House Document No. 722, 71st Cong. 3d sess.

6. Attorney General J. Howard McGrath before the Attorney General's Law Enforcement Officers' Conference, February 15, 1950, *Congressional Record* (temporary daily edition), February 17, 1950, p. A1228.

7. *Congressional Record* (temporary daily edition), February 17, 1950, p. A1219.

The Attorney General promised such aid as the Department of Justice could provide, warning at the same time against shifting to the federal government responsibilities which were properly local.

> We must never lose sight of the fundamental principle that local responsibility, fully realized, makes for sound government and healthy law enforcement. That is the true meaning of "States rights" and "home rule." Conditions which breed contempt for law can only become worse if we allow ourselves to be lured away from sound principle by the temptation to pass off State and municipal responsibilities to the Federal Government.[8]

President Truman called for local, state, and federal cooperation in the war against crime but noted that crime was not the product merely of organizations of evil men.

> Above all, we must recognize that human misery breeds most of our crime. We must wipe out our slums, improve the health of our citizens, and eliminate the inequalities of opportunities which embitter men and women and turn them toward lawlessness. In the long run these programs represent the greatest of all anticrime measures.[9]

In thus emphasizing the causes of crime which are inherent in a badly organized society, President Truman related the function of crime control to other basic functions of government to be discussed hereafter.

GOVERNMENT IN RELATION TO PROPERTY

Police Power and Property. The policeman protects not only people but their property as well. So close, indeed, is the relation between people and their property that in preserving order it may be next to impossible to draw a line between them. It is a rarely philosophical individual who can say, and seriously mean, that he "who steals my purse steals trash."[10] In the thinking of the early American there was likely to be little distinction between the purse and the self — or at any rate between the self and personally owned property of some kind. To be "somebody" one had to own property. Indeed, the average person practically had to be an owner in order to survive. Government which protected persons protected property also as a matter of course.

The most important form of property in pioneer days was land, which came close to representing the sum total of resources. One of the most important functions of government, therefore, was to establish the soundness of titles to land and to give them protection. The task was difficult. Various British rulers had made grants of huge tracts of land in the new world without careful definition of boundaries. Parts of these tracts had been

8. *Ibid.*, p. A1229.
9. *Congressional Record* (temporary daily edition), February 6, 1950, p. A1153.
10. Who steals my purse steals trash; 'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And leaves me poor indeed.

Othello

resold, some of them many times, again without adequate records and without adequate definition of boundaries. As land was settled its value increased and the value of still unsettled land increased along with it. During the years immediately after the adoption of the Constitution, people with money to spend bought and speculated in unsettled land just as a century and more later they bought and speculated in securities on the stock market. Some of them built family fortunes. Others, like James Wilson, a member of the Supreme Court of the United States, were impoverished when their speculative ventures failed. Because land was the principal form of property available for ownership and for use in acquiring still more property, and because titles were as yet insecure, controversies over land titles accounted for a large percentage of the more important cases in the courts of the country.

Land and Contracts. If property in the form of land represented sacred rights, contracts with respect to ownership of property were similarly sacred. The framers of the Constitution had written into that document a provision that no state should pass any law "impairing the obligation of contracts." When the legislature of the state of Georgia attempted to recover title to a huge tract which a preceding and apparently corrupt legislature had sold to speculators for a small fraction of its value, the Supreme Court held that it had no power to do so. The original sale of the land, Chief Justice Marshall maintained, constituted a contract which the state was forbidden to impair.[11] Chief Justice Marshall reached his conclusion largely on the basis of reasoning from the Constitution, but Justice Johnson, a colleague on the Court who voted with Marshall, relied on a general principle that a state had no power to revoke its own grants, "a principle which will impose laws even on the deity."[12] To him, in short, not even God could authorize violation of a title to property which had been created by state conveyance.

Property in Transition. The past century and a half has witnessed a steady transformation of the character of the property to which government gives protection. The sum total of property in the United States came to be represented less and less by land and other tangible objects and more and more by contracts, securities, and other promises to pay. Government which once protected merely the title to land came to protect also the right to do business, which itself came to be regarded as property.

The essence even of tangible property underwent an important change. In terms of the thinking of early Americans, ownership meant the right to exclude others from the use and possession of the thing owned, and also the right of the owner to use his property pretty much as he pleased. Nowadays, however, the right to exclude others from one's property is drastically limited in important ways. The owners of public utilities must render

11. *Fletcher* v. *Peck*, 6 Cranch 87 (1810). For discussion see Benjamin F. Wright, *The Contract Clause of the Constitution* (Cambridge: Harvard University Press, 1938).
12. 6 Cranch 143.

service to all would-be customers. The owners of coal mines and other property necessary to the public welfare may have their property seized and publicly operated at any time the public interest requires it.

The right of the owner to the exclusive use of his own property has at the same time gradually diminished. The change can be illustrated by contrasting the rights of a farmer on his own farm with those of the owner of a residential lot in a large city. The isolated farmer, like most early property holders of all kinds, can do pretty much as he likes with his land and the buildings and timber on it. He can build any kind of structure he wants and tear it down or burn it according to his whim. The owner of the city lot, on the other hand, is hedged by restrictions of all kinds. In certain areas, he can build only certain kinds of structures. Often he must build back a minimum distance from the street. He must build a minimum distance away from the border of the adjoining lots. He must get government permits and submit to government inspection of plumbing, heating, and gas and electric facilities when they are installed. In the use of his property he must conform to innumerable city restrictions, and he must pay in taxes an annual amount comparable to that which his great-grandfather may have paid for a good farm. The change in the character of property in the United States is comparable to the transition from the farm to the city lot. Since to most people property means the right to exclude others and the right to use as one pleases, the character of property or the relation of property to government is therefore almost incomparably different from what it was at the time of the adoption of the Constitution.

The Owners of Property. Along with changes in property itself, the owners of property have also changed. In order to engage in large scale business our forefathers found it necessary to pool their limited financial resources by the creation of corporations for business purposes. The corporation is now the primary instrument for the control of enterprise. Apart from farm land, and to a growing extent even there, the great mass of income-producing property is owned by corporations. The artificial, invisible, and intangible being which is called the corporation is related to the stockholders primarily through certificates of stock which in fact convey relatively little effective right of control. That right is exercised primarily by managers, who may have little investment in the property. The tendency to divorce the control of corporations from the ownership of stock means that the tasks of protecting corporate and private property are different in important respects. The corporate owner is ordinarily more powerful than the individual private owner and he behaves differently, and thereby he becomes a problem for government.

GOVERNMENT AND THE CHANGING ECONOMY

Changing Economic Patterns. As the governmental task of protecting life and property changes, so also the relation of government to the economy in

general changes. We have never had in the United States — nor has there been in any modern national community — a completely *laissez-faire* economy. That is, there has never been a situation in which government exercised no economic control whatever. There is, however, a striking difference between the relations of government and business today and those of a century and a half ago. Then our economy was relatively simple. Many people produced a great deal of the goods and services used by themselves and their families. The surplus that could go into trade for the products of others was relatively small. Little was needed from government except protection of person and property. An approximately *laissez-faire* government was entirely satisfactory.

Today we hear a great deal about the welfare state, the positive state, socialism, and statism. These terms reflect governmental adjustment to economic changes which have taken place in the United States and, indeed, over most of the civilized world. Our simple economy has become infinitely complex. Very few people, even on farms, produce any very large percentage of what they consume. Most people spend most of their time producing for others in order to get money or credit to buy what they want for their own use. It is not a simple matter of growing wheat to buy milk from the adjacent farm. It is production of goods or services for the uses of innumerable unknown people who produce other goods for still other people with an eventual return in goods bought by the first producer. Without going into the relations of foreign economies to our own — and many of them are closely related — we find our network of economic relationships extremely complicated. A strike in a west coast shipyard can mean unemployment in a New England factory. A freeze in Florida orange groves can mean a vast change in American breakfast diet. The effectiveness of a political lobby run by dairy interests may be felt in both the production and consumption of oleomargarine. Food surpluses generally throughout the country can mean a depression for farmers, reduced purchasing power for them, a decline in business for producers of farm machinery, and financial problems for credit agencies which lend money on farms and farm crops. Strikes or lockouts in major industries can shake the whole economy to its roots and threaten the country with the ravages of a depression.

So it is that "letting business alone," which may sound like a good idea when only the individual business man is involved, may seem very bad policy if it means doing nothing to prevent the upsetting of a national economic network on which the prosperity of all the people depends. The change in the economy has not come all at once, and the American people have not at any one time voted to abandon *laissez-faire* and adopt the welfare state or statism or any other "ism." The economy has changed gradually and governmental change has taken place step by step as discontented people have demanded it and as opponents of change have fought against it. The shift of economic power from the hands of the mass of individuals to those of the managers of corporations, and the popular distrust of

powerful and impersonal corporations, have had something to do with the change. But in large part the change was inevitable, as a result of the increased complexity of the economy.

The Developing Pattern of Governmental Regulation. American governments at some level have always done a limited amount of regulating. Seaports, for example, have been protected by quarantine laws, pilotage into harbors has been regulated, and cities have always enforced some health regulations. Regulations in these various fields have expanded with the growth of population. Regulating the value of money has the effect of regulating business. Banks — of which there were only three in the country at the time the Constitution was adopted — have always been chartered by government and regulated somewhat by charter provisions and by statutes. As the effects of bad banking practices on the economic life of the country were revealed in depression after depression, states improved their banking regulations and the federal government gradually became the major supervising agency; it operates today primarily through its control of the Federal Reserve System. Business corporations of other kinds were chartered primarily by the states, and their activities were limited by charter provisions and by growing bodies of statutes.

The framers of the Constitution did not foresee the growth of business corporations as major instruments of our economy and made no special provision for their treatment. The Constitution dealt with governments, on the one hand, and with persons on the other. Strictly speaking, corporations were neither governments nor persons. Although with their growth in economic strength the more powerful ones have come to resemble governments more closely than persons, the courts during the early years under the Constitution classified them with persons, and for many years they were held to be entitled to many of the privileges and immunities of persons. As the states attempted to regulate their activities, the courts, thinking of corporations as persons and imbued with the notion that the business of persons in a free economy should be largely free from regulation, found regulation unconstitutional on various grounds. Many of them were held to violate the due process clause of the Fourteenth Amendment, and those affecting commerce across state lines were held to violate the commerce clause of the Constitution — the clause which gives Congress the power to regulate commerce among the states.

Until the New Deal period in the middle 1930's, the courts, and particularly the Supreme Court of the United States, continued to resist the expansion of government regulation of business. The courts, however, could not stop — and did not try to stop — the transition from a simple and largely agricultural economy to a highly complex and largely industrial economy of mass production, mass distribution, and mass consumption. Since they could not hold back economic change they were unable also to prevent the steadily increasing use of government to coordinate the economy. The states found ways of expanding their regulations of business, and the federal

government followed suit. As more and more business involved activities across state lines, control, in order to be effective, had to be exercised by the federal government rather than by the states. The necessities of World War I brought the first great concentration of federal power over the economy. That concentration was relaxed when the war came to an end, but it provided the initial pattern for renewed concentration in the New Deal period when a centralized program was necessary to get the country out of the trough of the depression. The New Deal had but slightly relaxed its grip when World War II brought still further concentration of economic control into the hands of the federal government. Thereafter, conditions of world disorder and particularly the "cold war" with the Soviet Union required continued concentration of power. Indeed, the end of the process of concentration is not yet in sight.

The Variety of Regulation. Government regulation extends all the way from enforcement of urban zoning laws to monitoring television programs, from enforcement of vaccination ordinances to penalizing excessive production of cotton. It punishes disobedience, as in enforcement of traffic regulations, and rewards compliance, as in maintaining a high level for agricultural prices. National, state, and local governments participate in the regulatory process. The federal government uses for regulatory purposes the ordinary police machinery of government, regulatory commissions, government corporations, and various other instruments. It achieves some regulatory results in its capacity as a purchaser. With peacetime budgets in the vicinity of forty billion dollars a year, the exercise of governmental buying power does a great deal to determine the economic pattern.

SHARING THE NATIONAL WEALTH

Curtailment of Income. In a simple economy the ability of one man to acquire more property than others is likely to stand out as a mark of distinction. His success is applauded and envied, and parents urge their children to pattern their lives after his. In a highly complex economy such as ours, however, wherein getting and spending at one point may affect what happens throughout the entire economy, it may be socially undesirable to permit some people to accumulate great wealth while others remain inordinately poor. Although governments in the United States have long regulated the rates of public utilities, thereby limiting their accumulation of wealth, we have not generally interfered with the initial accumulation of income. Even in time of war, government has not gone so far as to implement the proposal of President Roosevelt that salaries be limited to $25,000 a year. We do effect some limitation, however, by graduated taxes on income.

Redistribution. The billions of dollars which the federal government collects in such a way as somewhat to equalize income and property hold-

ings is redistributed to the people in various forms. In January, 1950, in asking Congress for a budget of nearly forty-two and a half billion dollars President Truman noted that thirty billions, or about seventy-one percent of the total budget, would be used to pay the costs of past wars and to achieve a peaceful world for the future.[13] If the people actually succeed in buying peace by paying high taxes, or if heavy expenditures can keep for us a military advantage, the results may be deemed well worth the cost. But redistribution bears other fruits besides the absence of war and the presence of a powerful military establishment. These include an expanding system of social security, which provides support in old age and during unemployment, and public health programs which benefit the entire country. Government at some level provides public schools, public libraries, public parks, public highways, and innumerable other services for the people. The taxpayer pays, the public receives. To a considerable extent taxpayers and public are the same, but the process of taxing and paying results in a considerable redistribution of wealth and brings about a much more equal sharing of the national total than salary and other income figures would imply. It is through such functions that government has won the title of "the welfare state." A great deal of the service of government to the people is rendered, of course, more indirectly. It is rendered through promoting stability in the economy by striving for proper levels of production, prices, salaries, wages, and so on. It seeks to balance powerful interests in society and to promote the welfare of all without permitting serious injury to any.

GOVERNMENT AND LIBERTY

We live in a regime of bigness. The corporation has given us bigness in business. To defend themselves against powerful and impersonal employers, workers have organized to give us big labor. Government powerful enough to deal effectively with business and labor must be big government. Corporations and labor unions, though made up of human beings, are aggregations in which individuals may find themselves crushed by seemingly inhuman pressures. The same is true of government. Big business, big labor, and big government must be so coordinated and at the same time so restrained that the major purposes of life can be fulfilled. We assume those purposes to include the fullest possible development of the highest potentialities of all the people. We assume that people are important in themselves and not merely as members of powerful groups. Man does not exist for the sake of corporations or labor unions or governments. These things exist for the sake of man. They must be used to the full in his service, but they must not in any ultimate sense be permitted to use him. Government polices the offender, it enforces order, it organizes people for defense against external enemies and for cooperation with external friends, it balances the economy, and it uses the resources of the people for the bene-

13. Budget message, *Congressional Record* (temporary daily edition), January 9, 1950, p. 170.

fit of all. In short, it has the task of protecting essential personal liberties not only against other individuals and groups but also against government itself.

Yet not all pleas in the name of liberty are worthy of attention. It is worth something to live in a well-populated society with a highly complex economy such as ours, and the beneficiaries can be expected to pay something for this privilege in the way of restrictions. Just as the urban dweller must expect to be less "free" in the use of his property than the man on an isolated farm, so the man who shares the fruits of a mass-production economy on which the welfare of all depends must expect to be less free than the man who himself produces most of what he consumes. A great deal of lamentation about the passing of liberty marks but the desire to have the freedom of the old regime while enjoying the benefits of the new.

References

Carl Becker, *New Liberties for Old* (Yale University Press, 1941).

Arthur F. Bentley, *The Process of Government* (University of Chicago Press, 1908; reissued, Principia Press, 1935 and 1949).

Edward S. Corwin, *Liberty Against Government* (Louisiana State University Press, 1948).

Herman Finer, *The Theory and Practice of Modern Government* (Holt, 1949).

M. P. Follett, *The New State* (Longmans, 1918).

Ernst Freund, *The Police Power* (Callaghan, 1904).

Harold J. Laski, *A Grammar of Politics* (Yale University Press, 1929).

R. M. MacIver, *The More Perfect Union* (Macmillan, 1948).

Alpheus T. Mason (ed.), *Free Government in the Making* (Oxford University Press, 1949).

Chester C. Maxey, *The American Problem of Government* (Crofts, 4th ed., 1943).

Charles E. Merriam, *The New Democracy and the New Despotism* (McGraw-Hill, 1939).

John Stuart Mill, *Considerations on Representative Government* (Harpers, 1862).

Albert J. Nock, *Our Enemy, The State* (Morrow, 1935).

Edward M. Sait, *Political Institutions* (Appleton-Century, 1938).

T. V. Smith, *The Democratic Way of Life* (University of Chicago Press, rev. ed., 1939).

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Government and Other Regulatory Institutions

Although official government is an instrument of power in our society, an institution which regiments conduct, orders the economy, and promotes the welfare of the people, it is but one of many regulatory institutions. Although in this book we are concerned primarily with government and not these others, it can be accurately portrayed only in connection with other institutions which operate as alternates, rivals, aids, or hindrances to government. Prominent among these are the home, the church, the school; business corporations and groups of corporations operating in particular fields such as the press, radio, and motion pictures; and associations of employers, workers, and professional men. The conduct of all the people is at some time molded by various of these institutions as well as by the institution to which we give the formal title of government. As they determine our conduct, they are governments in everything but name. We are governed, therefore, not only from national and state capitals, county seats, and city halls but also from the power centers of these other institutions. They constitute a kind of federation of control, although a very loose one. There is an enormous amount of interaction among them, but government, by and large, is the dominant institution and is steadily increasing its powers at the expense of others. Yet the conduct of government is in part molded and restrained by the activities and policies of its competitors.

GOVERNMENT AND THE FAMILY

Parental Authority. Throughout recorded history parents have exercised considerable authority over their children. Even among slaves there have been gradations of control, and slave parents have usually ruled to a limited extent over their children. The amount of authority exercised by parents varies with living conditions and with social and economic systems. Among our European forbears, for example, where sharp class lines were drawn and families sometimes looked to marriage bargains to improve

their economic status, "upper class" young people often had their partners chosen by their parents. Young Americans gradually achieved marital freedom, but parental authority in the American colonies and early states was in some respects peculiarly strong. Pioneer families lived pretty much in isolation. They had little contact with any government that could maintain local order, or order at any rate within the family. Yet order had to be preserved if families were to be protected from Indians and other dangers and if a livelihood was to be wrested from the soil. The pioneers bred large families and brought them up to hunt and to clear and cultivate farms. Parents were likely to be firm rulers. Some were harsh despots, some were benevolent ones, and some encouraged as much democracy among their children as was consistent with orderly living. The principal ruler was likely to be the father. In the event of his death the mother took broader responsibility, or sometimes the eldest brother. Whoever the principal authority, a clear pattern of government prevailed until the children were old enough to get away from home.

The pattern of broad parental authority carried over into later periods, when family unity had lost much of its importance for defense and for earning a living. The parental hand still does considerable ruling, even though families no longer have to fight off Indians and children may make no economic contribution. Parental rule is somewhat relaxed, however, as official government comes into the picture. The governmental police system now gives children much of the physical protection that the family once had to provide. Government takes children away from parents for attendance at school, and prohibits most child labor outside the home. It requires vaccination and enforces other precautions against illness and poor health. It may require military service for defense of the nation as distinct from defense of the individual family.

Continuing Importance of Family Control. In spite of the narrowing of family jurisdiction over children, family government remains important. Official government requires only a minimum of attendance at school, minimum attention to health, a minimum of good behavior. If children get attention past this level, parents must see that it is provided. Government operates on children and other people largely in the mass. It touches primarily the outer edges, not the inner life. It is primarily in families that additional and highly personalized conditioning must be provided. It is first of all in the home that children form the patterns of habit and thought which will shape their behavior when they come into contact with government and when they become adult citizens and voters and perhaps officers of government. The home is the basic purveyor of tradition. It is in the home that the individual gets his first conception of right and wrong, and begins to learn the routines of behavior which are approved in the society into which he has been born. The child absorbs ways of behaving and thinking which to some extent condition his whole life. If the home produces vigorous, independent, and creative citizens who are conditioned

to behaving as our society expects them to behave, the governmental task of controlling them will be relatively easy, and they will be equipped to play their part in shaping the course of government. If the home is not properly ordered, if it reflects hostility to the community and jealousy of the rights of others whether in or outside the family, and determination to break social rules wherever possible and to avoid a share of community responsibility, the task of government will be difficult and the positive contribution of individuals to government will be small indeed.

One of the most embarrassing discoveries of psychiatrists is the extent to which the personalities of American young men have been warped or cramped by excessive mothering in their youth when those who smothered them with affection ought to have been helping to develop their sense of independence.[1] The function of the home is not merely to provide sustenance, affection, and assurance, and to establish good behavior routines, but also to challenge year by year the potentialities of the growing child so as to bring out all the independence of a well-rounded personality. Every home performs this function in some degree. The affection which is given — though sometimes too intensively or too exclusively — is a necessary factor in any good home. Lack of affection may so warp the life of a child as to restrict permanently his ability to play a leading part in society. The point is that for each child there is a kind of ideal balanced ration of affection, praise, challenge, and admonition which is needed to bring out his best potentialities. To the extent to which that ration gets out of balance, he faces adult life under handicap. This is not, of course, to imply that there is no chance of correcting any of the defects of childhood training. The varied experiences of life, if neither too harsh nor too gentle, gradually encourage the development of psychic maturity. Techniques of psychotherapy are becoming increasingly effective in the hands of experts.[2] The avoidance of mistakes, however, is even more to be desired than the techniques for their correction.

If the defects of home training reveal themselves under the tremendous stresses of war, they have their influence also amid other social conditions which throw strain upon psychologically handicapped people.[3] If home training fails to equip a man for cooperation toward the destruction of a military enemy, it may also unfit him for the general responsibilities of democracy. Hidden resentments and fears which destroy his adequacy as a soldier may render him untrustworthy as a citizen, as a legislator, as an executive, or as a judge. Conversely, if the home adequately fulfills its function, it can develop in each individual an awareness of the good as well as the bad qualities to be found in others, a tolerance for their foibles and a guide to their strength, a patience and a willingness

1. Among discussions of the subject see Edward A. Strecker, *Their Mother's Sons* (New York: Lippincott, 1946) and Edward Strecker and K. Appel, *Psychiatry in Modern Warfare* (New York: Macmillan, 1945).
2. See for example Carl R. Rogers, *Counselling and Psychotherapy* (Boston: Houghton Mifflin, 1942).
3. See H. A. Overstreet, *The Mature Mind* (New York: Norton, 1949).

to collaborate and to compromise where compromise is essential to collaboration, an ability to see men as they are rather than in terms of one's childhood associations, and all the other varied qualifications of good citizenship and good leadership in a democracy.

However much government may encroach on the earlier jurisdiction of the home by taking children away from it for education and by protecting them and caring for their health, the home as a governing institution remains enormously important to society and to official government itself. The home can fail as a purveyor of tradition and as an instrument for establishing social standards in the minds of the young; it can fail to develop the flexibility necessary for the exercise of independent judgment; but to the extent of its failure the whole social structure is weakened. With this weakening, the position of government itself is imperiled.

GOVERNMENT AND THE CHURCH

Church Control Over Members. The church is primarily concerned with religion, with man's relation to the Supreme Being, to the Infinite. Although far fewer people in the United States are subject to church authority than to the authority of parents, the power of the church in some cultures and at some times has been tremendous. Among primitive peoples the alleged ability of the priest or medicine man to wield the powers of magic often gave him great influence with rulers and peoples. In mediaeval times the Roman Catholic Church cowed rulers and peoples by the dread power of excommunication, exclusion from the Church in this life and from Heaven in the next.

At no time in American history has any church official exercised comparable power. Yet the exercise of authority by churches to mold conduct which affects the jurisdiction of government plays an important part in our history. A church was among the first institutions to be established by immigrant communities. Although rougher elements sometimes made it difficult to establish churches in western frontier communities, church people usually won out there too. Churches instilled principles of good conduct and thereby made easier the task of enforcing order. In the long run the minister or the priest was a more powerful peace officer than the sheriff. The minister, like the home, influenced the conduct of all the people; the sheriff dealt only with overt offenders. Although since we won our independence from England we have prided ourselves on the separation of church and state, religion has provided the sanction of much governmental activity. Every important officer must take an oath of office, an act which long implied belief in God and in the Bible, with the invocation of religious penalties if the oath was violated. Early American courts refused to receive testimony of witnesses unless the witnesses professed belief in God and in the power of an avenging deity to punish for swearing falsely.[4] The form remains, even though the perjurer now may fear punish-

4. See Jerome Frank, *Courts on Trial* (Princeton: Princeton University Press, 1949), p. 46.

ment by the court more keenly than the wrath of God. American legislative bodies still open their sessions with prayer — a practice in Congress which is discussed in a later chapter — however much or little the exercise may mean to the members.

Separation of Church and State. The framers of the Constitution and their contemporaries were in general religious people. It was not by way of attacking religion that they attempted to separate religious and secular institutions. They did it for the good of religion, government, and the people at large, acting on the basis of centuries of ugly experience. As recently as 1947 Justice Black found it necessary to summarize this portion of our history in explanation of a current decision of the Supreme Court. He wrote:

> A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government — established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.
>
> These practices of the old world were transplanted to and began to thrive in the soil of the new America. . . .
>
> These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment.[5]

Religion was regarded largely as a matter of state rather than federal jurisdiction and it was in the states that most important decisions were made. In the mother country it had long been the practice to establish a particular church, whether Protestant or Catholic, as the official church, to give it financial support, and to discriminate with varying degrees of harshness against other expressions of religion. The states, for the reasons given above by Justice Black, gradually abandoned the practice of "establishing" any church and recognized the right to freedom of worship. To insure that the federal government should take no backward step in this field, a provision was included in the First Amendment to the effect that

5. *Everson* v. *Board of Education,* 330 U.S. 1, 8–11 (1947).

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Church Influence with Respect to Government. Except for the controversy over the financing and control of education, which will be discussed later in this chapter, churches have in large part accepted the denial of state aid and their general exclusion from governmental functions. They have not been treated with hostility. They have been granted tax exemption on their property used for religious purposes and have received other favors and tokens of approved status. Their separation has not prevented them from engaging in propaganda for government measures which they advocate. On occasion church leaders become militant advocates on such issues as prohibition, child labor, and health and welfare legislation.

Although in time of war churches usually support the government, at least by giving spiritual aid and comfort, in peace they take a more or less vigorous stand against war. Both Catholic and Protestant churches denounce communism and particularly its anti-religious aspects in the U.S.S.R.

Particular churches and local congregations, it is true, are likely to be influenced considerably by their particular make-up. Seldom, for example, does a wealthy church in a wealthy community become the spokesman of drastic social reforms. Substantial church groups sometimes come under the leadership of anti-reform groups. At a meeting of the lay leaders of the Presbyterian church, for example, a member who was listed as President of the Armstrong Cork Company urged that the most immediate threat to the United States came not from communist infiltration but from paternalistic, bureaucratic, and highly centralized government. He warned that the United States was being pushed into a welfare state and that "the welfare state will result in a termination of the magnificent progress which America has made under the free enterprise system."[6] It is safe to say that had such a Presbyterian group consisted of labor leaders the attitude toward the welfare state would have been entirely different.

GOVERNMENT AND THE SCHOOL

Government Control. Much more than in the instance of the family and the church, government has assumed jurisdiction over the school, so that the school in many instances is to be identified with government and not classified as a competing institution. This is not completely true, however, and to the extent to which it is true it has come about gradually. Although no important body of doctrine separated school and state as church and state were separated, most early American schools were private rather than public. They were private in part because of the *laissez-faire* attitude of the times, in part because there was no tradition of attempting to educate all of the people, and in part because the pioneer society was not financially able to provide democratic education for everybody. Yet democracy could

6. Baltimore *Evening Sun,* February 12, 1950.

not survive if education was to remain the privilege of the special few. By a slow process state and local governments began to provide free schools, training in the three R's — readin' and 'ritin' and 'rithmetic — and then in other subjects. They began to require school attendance for limited periods, and then slowly raised the requirement. The gradually expanding flow of state and federal funds led to the improvement of common school systems and to the addition of high school, college, and university systems. Some of the largest and most influential universities in the country are state institutions.

The Place of Private Institutions. Yet by no means all important educational institutions are run by government. Harvard, Yale, Columbia, Princeton, Johns Hopkins, the University of Chicago, Stanford and many other institutions at the university level are privately operated. Protestant denominational colleges are spotted all over the country, and many denominational and non-denominational preparatory schools are maintained. Catholics maintain schools at all levels. Directly and indirectly these institutions have great influence over government-operated schools and over government itself. Like the family and the church, they maintain standards and teach the observance of standards. They help shape the conduct of the people they teach, and therefore make easier the task of official governing. Private as well as public schools train large numbers of people who become government officials, thereby helping to shape government policy. The major private universities carry on research, the results of which are utilized particularly by the armed services.

Private universities are further related to government in that the government finances huge research projects within the universities, thereby helping them solve budgetary problems. Millions of dollars have been paid in tuition to former members of the armed forces who elected to study in private schools. The aid has been given with primary emphasis on the rights and needs of veterans, but government has also been aware of the value of private schools in our society and of their financial problems. Because private endowments are inadequate, government aid in increasing amounts is to be expected if the value of private institutions continues to be recognized. It remains to be seen, however, whether such aid administered on a large scale will leave them as private institutions or will convert them gradually into quasi-governmental institutions.

Religious Education. For more than a century it has been the policy of the several states to exclude the teaching of religion from the public schools. While Bible reading has been permitted or required, religious history has been taught, and deference has been paid to other symbols of Christianity and particularly Protestant Christianity, the religious characteristics of our public schools have been pallid and largely passive even at their very best. While the majority of Protestants in the United States have believed in the separation of religious from secular teaching, Catholics

and minority Protestant groups have thought otherwise. Catholics have taken the position that for Catholic children the two kinds of teaching must be integrated, and that since Catholicism could be taught only by the church itself, all education should be under the control of the church. Wherever possible, therefore, the Catholic Church has maintained its own school system for its own children in spite of the fact that Catholic parents, like other taxpayers, must pay taxes for support of the public school system. Lutherans increasingly provide their own parochial schools, and other denominations do so to a lesser extent. Many Protestant denominations have in the past supported academies and colleges which offered some religious instruction and attempted to preserve a religious atmosphere.

In spite of the continuing disagreement among denominations as to how religion should be taught, most people believe deeply enough in the importance of religion generally and in the principle of freedom of religion that they approve of the maintenance of parochial schools if the individual denominations can support them without aid from government. The financial problem, however, has grown increasingly difficult. In large numbers the early denominational academies and other academies supported by private funds gave way to public high schools. Similarly, denominational colleges have found it an up-hill task to pay salaries and provide buildings, libraries, laboratories and other teaching equipment of a quality which would compete with state universities. With increasing governmental expenditures on public schools at all levels from kindergartens to universities, even the powerful system of Catholic schools finds it hard to compete. Catholics want religious education for their children, but they also want the increasingly expensive educational facilities provided in the public schools which they help to support.

Protestants have a somewhat different problem. A century and more ago, when the area of governmental activity was strictly limited and when public school education was limited, they believed that religion could be better advanced if it had no connection with government, either through regulation or support. They have seen non-religious education expanded until it takes most of the time which young people can be expected to devote to study. They have become aware that the limited work of Sunday Schools has not adequately preserved for younger generations the religions of their ancestors. Religion, in other words — or Protestant religion at any rate — has seemed to be gradually fading out of our culture. Whatever the original belief in complete separation of church and state, therefore, many thoughtful Protestants are coming to believe that, in an era in which almost all other desirable social institutions get some kind of support from government, religion too must have it to survive.

Governmental Aid to Religious Education. Both Protestants and Catholics, therefore, have become dissatisfied with some aspects of the separation of church and state. Catholic schools have benefited somewhat in recent

years by governmental expenditures to promote the health of all school children, such as those subsidizing school lunches, providing for health inspection, and providing for transportation between home and school. The Supreme Court of the United States while insisting that the Constitution provides for complete separation between church and state, has upheld the payment of bus fares transporting children to parochial schools on the ground that the aid provided is aid for the children and not for the religious institutions as such.[7] Year after year Congress considers measures for vast expenditures of federal funds on public education throughout the country. At congressional hearings on these measures, Catholic spokesmen insist as a condition of their support that such measures must provide funds to aid secular education in parochial schools as well as to promote public school education. Protestant groups, sensing that most of this support would benefit Catholics rather than Protestants, tend to oppose it. The controversy has the effect of restraining expansion of federal aid to education.

Thus far Protestant churches have sought not so much direct financial expenditure on Protestant education as a sharing of the time which public schools exact of children. In communities all over the country during the 1940's the Protestant churches, sometimes in collaboration with Catholics, arranged for "released time" programs, varying greatly in detail, whereby children were released from public school classes to attend classes in religion taught by representatives of their respective denominations. One of these programs, authorized by the Illinois legislature, was held unconstitutional by the Supreme Court of the United States.[8] In this instance the religious classes were held in school buildings and the children had to exercise the option of attending either their regular classes or the classes in religion. The Court held that the requirement violated the principle of the separation of church and state.

In the light of changing and at the same time greatly varying ideas in the minds of the people, and in the light also of the attitude toward governmental aid to parochial schools taken by the Supreme Court, it is impossible to predict the ultimate fate of those institutions. It is impossible to predict whether Protestant religious leaders will be able to recapture from governmental jurisdiction enough of the time of public school children to revitalize religious instruction for those children. Indeed, the vitality of religion in our society generally, and the probability of survival of religious influence, is a largely unknown quantity. We can predict for some considerable time, however, the survival not only of many religious denominations but also of some of their schools, even if those institutions continue gradual decline by comparison with public schools. Even if the churches and their schools influence directly only a small proportion of the people, their influence on standards and behavior will make them important as rivals of public schools and as parallel institutions of government. Without

7. *Everson* v. *Board of Education*, 330 U.S. 1 (1947).
8. *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948).

them the task of government in preserving order and in perpetuating ideals would be far more difficult than it now is.

GOVERNMENT AND AGENCIES OF COMMUNICATION

The family, the church, and the school are important for the purposes of this chapter because they are competing agencies of government or parallel agencies which share with government the task of molding human conduct. Apart from the paternal hand — which government will curb if used too harshly — these other institutions do not use force. They do, however, have power to coerce; they can make individuals behave as they would prefer not to behave. Whether by threat to exclude from Heaven, to cut off weekly allowances, or to withhold passing grades, they guide behavior. Although they are restricted in their methods, governments are also restricted; they must not deny "due process of law" or administer "cruel and unusual punishments." More important, perhaps, than the use of outright coercion is the exercise of influence which is effective without extensive pressure. Teaching, indoctrination, and persuasion implant points of view, beliefs, and attitudes which shape conduct. The persuasion and the example of a loving mother, a respected teacher, or a revered minister may do a great deal more to shape conduct than the entire arsenal of a local police force. There are other agencies, including particularly the press, the radio, and motion pictures, which duplicate, aid, or hinder government in the molding of conduct, and which though loosely organized within themselves, exercise what might almost be called powers of government. The activities of these agencies of communication, like those of the family, the church, and the school, need to be kept in mind if we are to see official government in its proper perspective.

The Press. Although it is in the hands of the government to a far lesser degree than are our educational institutions, the press, like the school, is partly government-managed and partly private. The most active of all publishers is the federal government itself. A Republican senator, obviously critical of wholesale publication by a Democratic administration, called the attention of Congress to the fact that during the ten year period ending with 1948 the Government Printing Office had issued 133,582,867,587 copies of printed matter.[9] These publications deal with almost every conceivable subject. Among the more voluminous documents are the *Congressional Record*, published daily when Congress is in session and thereafter bound in volumes, congressional hearings, congressional reports, statutes, and other legislative items. From the executive branch come the *Federal Register*, with executive and administrative orders of all kinds, reports of departments, and specialized reports on innumerable subjects. From the judiciary come reports of court decisions. The materials which go into the

9. Senator Styles Bridges, *Congressional Record*, March 9, 1949, vol. 95, part 2, p. 2057.

Congressional Record and into many other government publications circulate widely throughout the country. They are important partly because of their influence on public opinion and the molding of popular reactions to the government itself. Our concern at this point, however, is with the control exercised not by the government but by non-governmental agencies.

It was the non-governmental press which the framers of the First Amendment of the Constitution had in mind when they drafted the provision that "Congress shall make no law . . . abridging the freedom of speech or of the press." Considering a free press essential to the operation of democratic institutions, they were determined that it should remain free even though it was often a thorn in the side of honest men as well as of scoundrels and would-be dictators. Whatever may be their several degrees of accuracy, the publication of newspapers, magazines, and books has expanded into a tremendous industry. As of 1939, the average daily circulation of morning newspapers was more than 17,000,000 copies and of evening papers more than 25,000,000 copies. The average circulation of Sunday papers was more than 33,000,000 copies. The circulation of weekly newspapers ran to more than 18,000,000 copies. Among periodicals, those published monthly issued more than 134,000,000 copies; those published weekly more than 55,000,000; and those published quarterly more than 26,000,000. Lesser totals were accumulated by periodicals published at other intervals.[10] For the fiscal year ending June 30, 1947, the Library of Congress issued copyrights for more than 52,000 books and pamphlets, of which more than 49,000 were published in the United States.[11]

These figures indicate something of the vastness of the stream of materials published by private organizations and individuals to inform or influence the opinions and actions of the American people. Whatever question there may be about the freedom of the American press, there is obviously no question about its dimensions. As a matter of fact, the more serious limitations upon freedom of publication may lie in the vastness of publishing organizations rather than in governmental restrictions upon what is read. The publication of the average daily city newspaper is a tremendous business with the inevitable outlook of a business interest. Whereas the newspaper itself may be largely free from governmental restriction upon its contents, there may be relatively little freedom of expression for the writers of editorials and news. There is truth as well as irony in the remark that any man can have freedom of the press if he has $10,000,000. If he lacks the tremendous sum necessary for publication and distribution he may still have nominal freedom of the press, but its meaning for him may be extremely limited. A similar difficulty arises in the publication of books. Publishers can be found for a book of almost any kind which will sell widely. Those which are highly specialized, on the other hand, and which appeal to a very limited audience may have great difficulty in finding a publisher.

10. The data are compiled, *Statistical Abstract of the United States,* 1948, p. 866.
11. *Ibid.*, p. 898.

Most of the vast stream of privately published materials flows out into society without coming into direct contact with government except through using the mails, receiving police protection, the payment of taxes, and in the instance of a limited portion of it, the enjoyment of copyright protection. Materials deemed injurious to the reading public may be excluded from the mails and banned from interstate circulation. The relationship of the press to government with which we are here concerned, however, is through the effect of printed matter upon the minds and actions of readers. Newspapers, magazines, and books mold thought and behavior. They influence the attitudes of the people toward the government itself and toward particular government policies. By molding public opinion they make it easy or difficult for government to exercise its powers. Publications can raise the level of thought and action or they can maintain it in the lower registers. It is a lamentable fact that newspapers are under pressure to operate on low levels of sensationalism and emotional stimulation generally to achieve maximum sales.

Among the most controversial problems in the field of publication are those connected with reporting the activities of government itself. We meet on the one hand the constitutional guaranty of freedom of the press and the democratic need for full information about government, and on the other hand the need for protection against disclosing facts to foreign enemies. Government agencies are likely to be strongly security-minded. In 1947, for example, agencies concerned with military affairs and with foreign affairs generally formulated a proposed code which would have suppressed information down to the level of that which would have "caused serious administrative embarrassment or difficulty."[12] The authors of such proposals have lost sight of the fact that government does not exist for the primary purpose of preventing embarrassments or difficulties for administrators and that, indeed, considerable harrassment of administrators may be essential to the public welfare. On the other hand, the public safety is not to be neglected merely to enable powerful newspaper organizations to enlarge their sales by making sensational disclosures. At any rate, whatever may be the right to publish or withhold government news, in a given instance, the activities of the press are enormously important to government. Beyond the scope of government news itself they are important to whatever extent they mold popular attitudes and popular activities in areas in which government might or does operate.

Radio and Television. Radio and television also are instruments of social control. By contrast with Great Britain, where the British Broadcasting Corporation is in large part an instrument of government, government in the United States has gone only to a limited extent into the business of broadcasting. A few cities and a few states or state universities operate or have extensive access to the facilities of local stations. During World

12. Quoted by Arthur Krock, "A Recurrent Effort to Control the News," *New York Times*, October 24, 1947.

War II the federal government sponsored short-wave programs to foreign countries to build up good will for the United States and counteract enemy propaganda. Current operation of the "Voice of America" in Europe to counteract communist propaganda and to attempt to reach people inside the Soviet Union is still in the experimental stage, with important results still unpredictable.

Most broadcasting in the United States is in the hands of private corporations which, however, must be licensed by the federal government. Government enforces licensing requirements because broadcasting facilities, by contrast with publication facilities, are limited. There are by no means as many wave lengths as potential broadcasters would like to use, and those available must be allocated to prevent "traffic" conflicts. The government operates on the theory that the air waves belong to the public rather than to first users, and grants and renews licenses "if public convenience, interest, or necessity will be served thereby." In acting on applications for renewal of licenses the Federal Communications Commission, although it is denied the power of direct censorship, feels obligated to consider the character of the broadcasting being done as a measure of service to public interest, convenience, or necessity. The survival of a broadcaster, therefore, is subject to the critical judgment of the commission.

Like the press, the broadcasting industry has to cater to advertisers. To please them it has to reach a maximum audience. To do this it must, or most of its advisers believe that it must, operate on a low cultural level. It cannot profitably stress the best in music, drama, and critical discussion because audiences with mediocre tastes would be bored and would listen to something else — with the result that they would not hear or see the advertisements, would not be persuaded to buy the goods advertised, and advertisers would stop financing the broadcasting programs. Through its power over licenses the Federal Communications Commission can eliminate programs that are offensively low, but it can do little to promote genuinely high quality. Yet broadcasting provides facilities for reaching the American people such as are provided by no other instrument. It molds tastes as well as caters to them. It has a peculiar fascination for children of school age, whether on radio or television. A survey of a Stamford, Connecticut, high school made public in March, 1950, showed that 79 percent of the student body regularly looked at television, spending an average of eighteen hours a week before receivers.

Motion Pictures. Although in their importance for government motion pictures are not to be compared with the press and radio and television, they too play a part in molding the sentiments of the American people. The "movie" industry is largely in the hands of a few powerful producers who garner huge profits and pay high salaries to top performers. Here, as with the press and radio, the business seeks the largest possible audience in its effort to collect the highest possible returns, and again the character of programs is shaped to that end. Government interference with motion

pictures consists largely of state censorship which can be effective in eliminating objectionable materials but can do little or nothing to raise standards above a mediocre level. The average motion picture brings entertainment by helping audiences to escape into a dream world. The picture may have little relation to life as it is lived in the United States — thereby incidentally giving foreign audiences a startlingly incorrect impression of American culture. Yet the instrument can reproduce the finest in music and drama and can graphically portray public events which the press can show only in cold print. It can and does have a great influence in molding public standards whether its level of operations be high or low.

BUSINESS AND VOCATIONAL AGENCIES

The Business Corporation. In addition to the basic institutions and the agencies of communication previously discussed, certain business and vocational agencies loom large in the social structure of the United States and operate in a sense almost as if they were governments. They affect the character of official government and are, in turn, modified by it. The most powerful of these agencies, the business corporation, is a device for bringing together under centralized control the large quantities of capital necessary for the operation of business on a gigantic scale. Without the corporation, business operations would have to be conducted on an inconceivably smaller scale than those we know, or else they would have to be conducted directly by government. In a strictly legal sense the corporation derives its existence from government. It is an artificial person which only government can bring into being. It utilizes private resources, however, and operates under private management, and oftentimes expresses policies different from those of the government which created it. The economic history of the United States has been primarily the history of transition from an economy of simple agriculture and "petty trade" to one of mass production industrialism carried on by means of business corporations.

Although for the most part the relations of government to business must be left for discussion in later chapters, certain materials are summarized here for the light which they throw upon our organizational pattern. Large scale operations now characterize most fields of business activity. In 1941 a federal agency called the Temporary National Economic Committee suggested the power of great corporations by reporting that five life insurance companies controlled nearly 55 percent of life insurance assets, amounting to $28 billion. Big corporations earned a large percentage of the total of corporate income of all kinds. The committee found that in 1929 the three-tenths of one percent of all corporations whose incomes were over $1 million earned 80 percent of all income earned by corporations.[13]

In the field of production, the committee found that in 1937 3.8 percent of the manufacturing establishments employed 51 percent of all wage

13. Temporary National Economic Committee, *Investigation of Concentration of Economic Power,* Senate Doc. No. 35, 77th Cong., 1st sess., p. 91.

earners, paid 55 percent of the total wage bill, produced 61 percent of the value of all manufactured products, and accounted for 56 percent of the total value added by the manufacturing process.[14]

Other figures show that within great corporations ownership is concentrating in relatively small groups and that, as already indicated, the management of many corporations is finding its way into the hands of groups of individuals who are able to retain their power without the necessity of extensive personal investment. So it is that, in summary, wealth and economic power and the direction of business enterprise are passing from private individuals to business corporations; among corporations the trend is from small to large; among large ones the larger expand more rapidly; among the larger ones ownership concentrates in small minorities; and management consists of smaller minorities than do major owners and is to an increasing extent divorced from ownership.

It is obviously a major concern of government that these gigantic and centrally-managed concentrations of power range at large in society and either promote or frustrate the ends of society as a whole or of government, depending upon their strategy for the achievement of their own ends. The states, which create the corporations as legal entities, have long found it necessary to limit the range of their activities both through restrictions in the charters of incorporation and through regulatory legislation, although the power of individual corporations may be so great as to make enforcement extremely difficult. The first broad federal intervention came in 1887 with the Interstate Commerce Act for the regulation of interstate railroads. Then in 1890 Congress passed the Sherman Anti-Trust Act to forbid combinations — in the form of trusts or otherwise — to obstruct interstate trade. The primary purpose of that statute was to curb the predatory activities of powerful corporations which were driving less powerful competitors out of business and oppressing the consuming public. Other federal regulatory measures have followed at an increasingly rapid rate.

Employers' Associations. Corporations and corporation executives strengthen their positions by federations of varying degrees of tightness or looseness. They achieve measures of unity through holding-companies, interlocking directorates, and trade associations. They make use of huge organizations such as the National Association of Manufacturers and the Chamber of Commerce of the United States. The NAM claims a membership of 16,500 manufacturing companies employing 75 percent of the manufacturing employees of the United States.[15] It issues publications and in other ways attempts to educate the people concerning the merits of the capitalist system as it operates in the United States. It attempts to shape the course of legislation with respect to private enterprise. A Washington lobbyist of the NAM, registering under the lobbying provisions of the Legis-

14. *Ibid.*, p. 90.

15. Statement of Ira Mosher, Chairman, Executive Committee, National Association of Manufacturers Before House Committee on Education and Labor, March 7, 1947 (mimeographed).

lative Reorganization Act of 1946, listed as follows the proposed legislation he was employed to support or oppose during the third quarter of 1947:

> All bills affecting the following subjects: national labor policy, portal-to-portal wage claims, tax laws, reduction of federal expenditures, control of atomic energy, federal subsidization of research, patents and trademarks, wartime control powers, and revision of the SEC and RFC Acts.[16]

The Chamber of Commerce of the United States is a federated organization of private groups with headquarters in Washington. Its component units are municipal chambers of commerce from all over the country together with a long list of local commercial associations. Its purposes are much the same as those of the NAM. These organizations represent concentrations of great power which inevitably has an impact upon the character and scope of governmental activity.

Labor Unions. The organization of labor unions has been the workers' answer to the concentration of the power of employers in corporations, trade associations, and other forms of organization. An opposing concentration of some kind was necessary if organized employers, justifying themselves in terms of iron laws of wages, rights of property, liberty of contract, and other convenient dogmas, were to be debarred from ruthless exploitation of employees. During the late nineteenth century when they were first making themselves effective, unions not only had little protection and aid from government but had to fight classification as illegal conspiracies by virtue of their mere existence. Judges who knew more about legal tradition than about the fundamentals of changing social conditions viewed unions with an unfriendly eye. They made free use of injunctions in the interest of employers. The Sherman Anti-Trust Act, which was only reluctantly applied to business, was applied with verve to combinations of workers.

Public sentiment in support of labor organizations gradually developed. During the New Deal period the strategy of the federal government shifted to positive support of unions in their competitive struggle with employers. The theory was that a healthy economy required a better distribution of national income through shorter hours and higher wages for all employees and that in so far as possible this should be brought about by the bargaining power of labor rather than by the coercive hand of government. In large part, therefore, the government attempted indirectly to improve the position of labor by strengthening labor's bargaining position, although enactment of such regulatory measures as the Fair Labor Standards Act did provide direct aid.

Government support of the cause of labor has stimulated the growth of union membership. It is estimated that total union membership now runs to some 16 million. Of these the American Federation of Labor headed by William Green claims more than eight million and the Congress of Industrial Organizations headed by Philip Murray claims some six million. The

16. *Congressional Record,* November 17, 1947, vol. 93, part 8, pp. 10619–20.

remainder are affiliated with the Railway Brotherhoods, the International Association of Machinists, and other independent unions.[17] Groups of such size inevitably wield great influence.

Professional Associations. A number of professional associations have close relations with government and determine the course of governmental activity in important fields. The American Medical Association is largely responsible for the development and maintenance of standards in medical training and practice. It in effect makes much of the law relating to the subject. The organization therefore wields great power within the medical profession and upon society. Its exercise of power by no means pleases all competent members, particularly in its opposition to socialized medicine; yet the legitimacy and importance of many of its functions is generally recognized.

The American Bar Association holds a similar position of power in the legal profession. Like the AMA, it renders important service to society and serves as an aid to government. Here, too, however, power tends to fall into the hands of wealthy and conservative members. The conservatism of the ABA is apparent in the positions it takes on almost all issues of social legislation and proposals for extension of the regulatory power of government.

So it is in many professional fields. Professional associations set standards of conduct and of training for entrance and, with or without the direct collaboration of government, enforce their rules upon private individuals. Where necessary they give advice which government translates into legislation. Their practices further demonstrate the fact that there is no sharp line between official government and other kinds of organizations but that, rather, they shade into each other and each acts upon the other in various ways. Control over individuals is not monistic; it does not flow exclusively from a sovereign state. It is plural. It flows from many kinds of organizations and institutions which interact in the social milieu.

MULTIPLE GROUP CONTROL vs. TOTALITARIANISM

Although this is not the place to discuss democracy in the relation of individuals to their government, the implications of multiple group control for democracy on the one hand and totalitarianism on the other should be noted. Our unwillingness to centralize all governing power in official government, our allotment of different powers to different agencies which have only the loosest connection with one another, is conducive to democracy and inconsistent with the principle of totalitarianism. An outstanding characteristic of German government under Adolf Hitler was the way it forced other institutions into subservience to the government. The family, the church, the school, agencies of communication, business, and business and professional organizations, all were transformed or were in process of being

17. *The World Almanac,* 1950, p. 381.

transformed into governmental instruments. The prime consideration was not to develop the individual but to glorify and further the cause of the all-powerful Reich. The family was coming to be looked upon as a convenient, although by no means essential, instrument for breeding super-men. Pressure was directed to compel churches to preach doctrines approved by the government. Universities were coerced into propagating social and scientific doctrines consistent with Nazism. Agencies of communication were completely controlled. Powerful business organizations and professional groups were brought into subjection to centralized power.

The government of the Soviet Union has likewise brought other institutions into strict subordination to the state or destroyed them altogether. In the enthusiasm of its early years it degraded the family by permitting divorce at will and by legalizing abortion, but it has now reversed its position in these matters, finding the family a desirable instrument of government rather than an important rival. It assaulted religion as an insidious opiate of the poor administered by a politically dangerous form of church organization; it continues to profess the same attitude toward religion but, apparently feeling that the church has been reduced to a point where it is no longer dangerous, it has permitted restoration of some formal religious observance. Soviet education is controlled strictly by government and all teachings must conform to communist doctrine as interpreted by Joseph Stalin and the Politburo. Even theories of inheritance as worked out by biologists must be made to square with communist assumptions that people can be changed fundamentally by changes in their environment and that the changes will be passed on by inheritance.[18] Educators dissent from official doctrines at their peril and must usually make public confession of error to avoid punishment. In 1948 a distinguished Soviet economist, Eugene S. Varga, was publicly denounced for deviation from the Soviet doctrine that capitalist nations would destroy themselves by economic collapse and war. All art must conform to communist ideology. Even music must avoid "bourgeois" characteristics, and composers who deviate from the indecipherable party line in such matters must confess error and promise correction. As for business, it has been brought completely under the control of government and the right of private ownership of instruments of production has been almost completely abrogated.

All this is strictly alien to American philosophy and American practice. Although in the readjustments necessitated by changes in our economy government has greatly increased its power, some of the other organizations, particularly business corporations and labor unions, have likewise increased their power. When we have enlarged government at the expense of other institutions we have done so not because we regard government or "the state" as an end in itself, but because we are experimenting with increased use of government further to promote the welfare of the people governed. Although the economics of mass production drives us toward uniformity

18. See Trofim Lysenko, *The Science of Biology Today* (New York: International Publishers, 1948).

in some matters, as in the kinds of automobiles we buy, we try to promote diversity as well. We think diversity and experimentation better protected if wherever possible we act through many different institutions rather than through the single institution of government. We guarantee freedom of religion, and raise serious questions only about giving positive aid to the church. We operate many educational institutions by means of government but we maintain private institutions at the same time and attempt to preserve their complete freedom — and even to protect against governmental interference academic freedom within the government-controlled system of education. We leave communication largely although not completely free of government control, and we expect much of the dynamics of society to be expressed through business organizations rather than merely through government.

References

Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (Macmillan, 1933).

Edward Berman, *Labor and the Sherman Act* (Harpers, 1930).

Zechariah Chafee, *Freedom of Speech in the United States* (Harvard University Press, 1941).

———, *Government and Mass Communications* (University of Chicago Press, 2 vols., 1947).

Peter F. Drucker, *Concept of the Corporation* (John Day, 1946).

R. A. Gordon, *Business Leadership in the Large Corporation* (Bookings, 1945).

Commission on Freedom of the Press, *A Free and Responsible Press: A General Report on Mass Communication: Newspapers, Radio, Motion Pictures, Magazines and Books* (University of Chicago Press, 1947).

William E. Hocking, *Freedom of the Press: A Framework of Principle* (University of Chicago Press, 1947).

Ruth A. Inglis, *Freedom of the Movies* (University of Chicago Press, 1947).

Alvin W. Johnson and Frank H. Yost, *Separation of Church and State in the United States* (University of Minnesota Press, 1949).

R. M. MacIver, *The Web of Government* (Macmillan, 1947).

President's Committee on Civil Rights, *To Secure These Rights* (Government Printing Office, 1947).

David W. Raudenbush, *Democratic Capitalism* (John Day, 1946).

Carl A. Rogers, *Counselling and Psychotherapy* (Houghton Mifflin, 1942).

Leon J. Saul, *Emotional Maturity* (Lippincott, 1947).

Smaller War Plants Corporation, *Economic Concentration and World War II,* Senate Doc. No. 206, 79th Cong., 2d. sess.

Anson P. Stokes, *Church and State in the United States,* 3 vols. (Harpers, 1950).

Edward A. Strecker, *Psychiatry in Modern Warfare* (Macmillan, 1945).

———, *Their Mother's Sons* (Lippincott, 1946).

Temporary National Economic Committee, *Investigation of Concentration of Economic Power,* Senate Doc. No. 35, 77th Cong., 1st sess.

Llewellyn White, *The American Radio* (University of Chicago Press, 1947).

4

The American Constitutional System

We often talk about the Constitution as the basis of our government, and so it is, particularly if we define the term as "the basis of government," but the definition means little unless we further explain what we have in mind. Our Constitution is variously defined as (1) the relatively brief document by that name which was drafted by a constitutional convention in Philadelphia in 1787 and put into effect in the temporary national capital in New York in 1789, and which is reproduced in the appendix to this and many other books on American government; (2) the pattern of organization of our government; (3) the body of principles which guides us in the exercise of governmental power; and (4) the body of formal restrictions on the exercise of governmental power which protects the people against arbitrary governmental activities and altogether forbids some kinds of interference with persons and property.

If our concern is with the realities of government rather than merely with definitions and classifications, we shall probably have in mind something of all these definitions when we talk about the Constitution. The Constitution is, of course, the document. From this document, or from the people through it, comes the power to govern. In the document, furthermore, are phrased restrictions on the exercise of that power which are rightly named constitutional restrictions. But the Constitution is a pattern of organization as well as a document, even though the pattern is partly defined in the document. The vast layout of governmental machinery in Washington and elsewhere throughout the country is basically so well and almost permanently established that it can rightly be called constitutional, even though some of it is defined only in federal statutes, judicial decisions, or administrative orders. The Constitution is a basic pattern.

But document and pattern though it is, the Constitution is also a body of principles. It embodies our belief in the value of the best in individuals, in the right of individuals to develop their fullest capacities, and in their right to be protected against arbitrary action and in some areas to be untouched

by government altogether. And it is also the body of formal restrictions on governmental action which are found in the constitutional document, and the further restrictions which derive from our social philosophy and which we put into practice through statutes or other governmental mechanisms or which we express by restraining government from doing things not forbidden by the constitutional document. To put all the emphasis on one definition and to disregard the others is to distort what is fundamental in the Constitution.[1] The Constitution is many-sided and highly diverse. It has, figuratively, all the colors of the spectrum.

CONSTITUTIONAL ORIGINS

British Sources. Our Constitution is largely British in origin. Until we issued the Declaration of Independence — the British say until the treaty of peace became effective after the Revolutionary War — the British constitution was the legitimate basis of government in the American colonies. Although the colonies, or some of them, had charters from the king of England, the source of power was the British constitution rather than merely the charters themselves. The British constitution was nowhere written down in full, or even in a well organized and comprehensive summary. There was no great need for a systematic statement of its contents. It had evolved through many centuries. The British people knew it for what it was, even if they were unable to produce a portrait of it. Its major outlines could be found by watching the flow of governmental power among the people, by seeing how and by whom power was wielded and by whom and in what fashion the exercise of power was restrained.

Changes in the British constitution came about partly by processes almost imperceptibly slow and partly by abrupt transitions. The latter were usually registered in what came to be regarded as constitutional documents. Thus Magna Carta, the great charter, was a list of restrictions on his powers enforced against King John in the year 1215. The Petition of Right, enforced

1. For this reason the author is unwilling to accept as fully adequate the statement that "a constitution is by definition a technique (or a set of techniques) for the restraining of the government." — Carl J. Friedrich, *Constitutional Government and Democracy* (Boston: Ginn, 1946), p. 135. The same excessively restricted interpretation is implied in Professor McIlwain's discussion of "constitutionalism" which, he holds, "has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law." — Charles H. McIlwain, *Constitutionalism, Ancient and Modern* (Ithaca, N.Y.: Cornell University Press, 1940), p. 14. For our own Constitution at least, most or all that is said by these and other writers speaking in the same vein is true as far as it goes. But to extract the restrictive characteristics from the concept of a constitution and to define them alone as constituting a constitution and to evolve from this restrictive process a value concept of something called "constitutionalism" is to depreciate the verbal currency by which we ought to evaluate that which constitutes the positive as well as the negative basis of our governmental institutions. Important as are the restrictive provisions of constitutions for the prevention of tyranny, and dangerously defective as any constitution would be without them, we should recognize the fact that historically "a constitution existed before any guarantees of civil or political liberty were incorporated in it." — Edward M. Sait, *Political Institutions: A Preface* (New York: Appleton-Century, 1938), p. 314. So too a constitution might exist today without any or without more than rudimentary restrictive devices, although we should undoubtedly regard it as a very bad one.

against Charles I in 1629, prohibited taxation without the consent of Parliament, the billeting of soldiers in private houses, execution of martial law in time of peace, and imprisonment without a specific charge. The Declaration of Rights of 1689 included many provisions reflecting the evils of the past years. Among them it prohibited the making or suspension of law without the consent of Parliament, it forbade the collection of taxes without the consent of Parliament, it proclaimed the lawfulness of petitioning the sovereign, it forbade the maintenance of a standing army without the consent of Parliament, it proclaimed the right to keep arms, it declared that elections of members of Parliament must be free, it demanded freedom of debate in Parliament, it forbade the requirement of excessive bail, it called for frequent meetings of Parliament. This Declaration of Rights was enacted by Parliament as the Bill of Rights. By the Act of Settlement of 1701, the king or queen was forbidden to leave the country without the consent of Parliament. Ministers were made responsible for the acts of the sovereign, and the judges were given the right to hold office for life unless guilty of misconduct.

As is shown by these illustrations, most such documents were in the form of restrictions on power. In this respect they resembled other "constitutional" documents in other countries which were executed as powerful rulers were hedged about with restrictions, as absolute monarchies were transformed into limited or, as was sometimes said, into "constitutional" monarchies. In short, over a period of centuries during which constitutional change ran in the direction of limiting absolute power, constitutional terminology came to be linked almost exclusively to restrictive provisions, in spite of the fact that the constitutions in operation included immeasurably more than merely restrictions on the exercise of power.

The Flow of Power in Great Britain. A brief summary will indicate the nature of American constitutional background in Great Britain. After the Norman Conquest in the latter part of the eleventh century, the British Isles were subject to no important influx of population from without. Although there were rival and warring groups within the British population, the British people were in a position to work out their own destiny largely without external interference. They approved of the trappings of monarchy and accepted it as the ruling authority except for the brief period of the republic under Cromwell in the seventeenth century. They took as a matter of course the division of society into classes and the exercise of a great deal of power by the nobles and clergy in the upper class, with the possessors of wealth gradually achieving power whether or not they were of the nobility.

With ups and downs through the period, the kings of England gradually lost power to Parliament over the several centuries preceding the American Revolution. Constitutional change included at once an increase in uniformity of government within Great Britain and expansion of the share of governing power exercised by nobles, middle class landholders, and merchants and manufacturers in the operation of the central government.

The king retained his importance as a symbolic institution but gradually lost to Parliament much of his actual governing power. It might also be said that in fact he lost power to the common law and to the courts which served as the spokesmen of the law, even though neither Lord Coke nor any other of the more powerful legal spokesmen ever succeeded in subordinating the king to the common law as they at times attempted to do. Common law principles, voiced by respected judges in case after case as the articulation both of sacred British customs and of natural law, had a strong pull on the sentiments of the British people and therefore helped to determine the kind of government the people would accept. Common law principles of right and justice, and mechanisms for achieving them, were transplanted to the British colonies in America and worked their way into the American constitutional system.

Colonial Revolt. The American colonies were founded by loyal British subjects. The colonists included religious dissenters, political prisoners, adventurers, and non-comformists of every kind, but they were not rebels in any fundamental sense. Nevertheless their British allegiance, or that of their descendants, was steadily though imperceptibly weakened. Although the settlers had been born in England, they had set out to establish new homes in a land separated from England by many weeks of dangerous and miserable sailing. The homes of their adoption became the native homes of their children. Within a few generations Great Britain came to seem a partly alien land which levied burdensome taxes on the colonies, regulated trade in its own interest, and enforced laws made in a country unfamiliar with American conditions and unsympathetic with American needs. The decay of sentimental attachments to the mother country left constitutional bonds vulnerable to attack. The constitutional disintegration came gradually amid bitter arguments on constitutional grounds. Colonial leaders contended that although they were subjects of the British king they were subject to the king alone, and not to Parliament. They regarded Parliament as a legitimate legislature only for Great Britain and not for the colonies, which had their own legislatures. Since most of the power of the king was being absorbed into Parliament, acceptance of this doctrine would have left the colonies with little control exercised from London — which was what they wanted. They accused George III of violating the principle that there should be no taxation without representation and innumerable other rights which they claimed under the British constitution. When in 1776 relations with the mother country reached the breaking point, the colonists included in their Declaration of Independence a powerful denunciation of the king's conduct in the form of a list of grievances.

The Constitutional Transition. The framers of the Declaration of Independence proclaimed as self evident the truth

> that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit

> of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

Having been deprived of their rights as British subjects, their rights under the British constitution which stemmed back to the Creator himself, the American people now exercised a supra-constitutional right to violate the British constitution by seceding from the empire and establishing a constitution of their own.

The task of the Americans was not one of establishing a single constitution to replace that of Great Britain. Each colony now called itself a "state." On their own initiative or at the suggestion of the Continental Congress which issued the Declaration of Independence, most of the states immediately drafted and adopted constitutions of their own. The Continental Congress at the same time drafted a document to provide a loose form of union among the thirteen states. It was presented to the states in 1777 and ratification was completed in 1781. This document, the Articles of Confederation, was the first written constitution for the entire United States. The several constitutions had to be written out as formal documents even though the constitution of the mother country had never been similarly drafted. The transition from one jurisdiction to another was too sharp a break with the past to permit continued exercise of governmental power without broad statements of constitutional goals and procedures. Furthermore, some of the colonies had been accustomed to look upon charters or grants from the king as statements of constitutional provisions, so that drafting constitutions merely replaced one form of document with another not entirely dissimilar. The Articles of Confederation were intended to verbalize such unitedness of all the states as the several states were willing to permit and to strive for. It was not intended to replace the British constitution in this country in its entirety but only in so far as constitutional matters were not encompassed by the constitutions of states which claimed to be and were admitted to be sovereign.

Contents of the First Constitutions. Genuine constitutions do not come out of a void or exclusively out of the doctrinaire thinking of scholars or statesmen. In large part they come out of the sentiments, the habits, the political expectations, the familiar ways of doing things which characterize a people. Although the American people resorted to revolution to free themselves from British control, the constitutions which they adopted were not revolutionary in character. The state constitutions pretty much mirrored the previously existing state governments, with changes to reflect colonial resentments in particular areas. They provided for elective legislatures consisting of two houses. They provided for governors but closely restricted their powers, no doubt largely as a result of their resentment against the

colonial governors sent by the king. They provided for systems of courts which in cases brought before them were to apply legislative acts, and, more important at the time, were also to apply the common law. They included bills of rights, enumerating many things which government was forbidden to do. These bills of rights contained most or all of the restrictions placed on government in Great Britain and others which reflected colonial experience in combatting what they regarded as British tyranny.

The Articles of Confederation, the constitution for the union of the states, provided for perpetual union among the states enumerated. It characterized the union merely as "a firm league of friendship," however, and declared that "each state retains its sovereignty, freedom, and independence, and every power, jurisdiction and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled." This constitution was little more revolutionary than the constitutions of the states. A loosely organized "Continental Congress" had evolved out of meetings of representatives of the several states to protest against British violations of the rights of the people under the British constitution. After the outbreak of war with Great Britain this Congress had remained to organize the country for war, draft a declaration of independence, and propose a constitution for ratification by the states. That constitution provided for a central government with narrowly restricted powers which was patterned after the Continental Congress itself. It was to consist of delegates chosen and paid by the respective states, and each state, whatever the number of its delegates, was to have one vote. The necessary funds for operation of the government were to be provided by assessments on the individual states which, however, the states could not be compelled to pay. No king, governor, president, or other executive officer was provided for except as the Congress, or "the United States in Congress assembled," chose its own presiding officer. The Congress itself was to exercise executive as well as legislative powers, and also, for the most part, the judicial powers as well.

THE NEW CONSTITUTION

Defects of the Articles of Confederation. The Articles of Confederation were defective as a constitution not primarily because they did too much or even because they did it in the wrong way, but because they did not go far enough toward providing a government adequate for the Union. Congress had no power to collect taxes directly from the people. It could only levy assessments on the states, which the states could not be compelled to pay. It had no power to regulate interstate commerce, or to prevent the several states from enacting tariff laws and other measures which interfered with interstate business. Except through the power to make treaties it was not authorized to regulate foreign commerce, and it had no power to prevent the states from levying tariffs on foreign goods and enacting other measures which interfered with its proper exercise of the treaty-

STRUCTURE OF GOVERNMENT UNDER THE ARTICLES OF CONFEDERATION (1781-1789)

EXECUTIVE BRANCH

NO NATIONAL EXECUTIVE WITH INDEPENDENT POWERS. ALL SUCH FUNCTIONS TO BE EXERCISED BY CONGRESS

"COMMITTEE OF STATES" TO CONDUCT AFFAIRS BETWEEN SESSIONS OF CONGRESS

LEGISLATIVE BRANCH

CONGRESS

UNICAMERAL. EACH STATE HAD 1 VOTE WITH 2 TO 7 DELEGATES.
POWERS LIMITED. COULD CONDUCT WAR AND FOREIGN AFFAIRS; REQUEST MONEY AND MEN FROM THE STATES; CONDUCT POSTAL SERVICE; REGULATE INDIAN AFFAIRS. OTHER POWERS WITH CONSENT OF 9 STATES, VIS. BORROW AND COIN MONEY; MAKE TREATIES; FIX SIZE OF ARMY AND NAVY; PASS A BUDGET.
LACKED POWER TO REGULATE COMMERCE OR TO LEVY TAXES.

JUDICIAL BRANCH

NO NATIONAL JUDICIARY. STATE COURTS ONLY

OFFICERS APPOINTED BY CONGRESS TO DO SOME OF ITS EXECUTIVE WORK, I. E., FOREIGN SEC'Y, SEC'Y OF WAR, ETC.

THIRTEEN SOVEREIGN STATES. CONGRESS COULD REACH THE INDIVIDUAL CITIZEN ONLY THROUGH THE STATES

THE INDIVIDUAL CITIZEN

ARTICLES OF CONFEDERATION AND PERPETUAL UNION
FUNDAMENTAL WRITTEN LAW UPON WHICH THE STRUCTURE OF GOVERNMENT WAS BASED

making power. It had no control over the currency and was unable to prevent excessive issues of paper money by the states, with the result that such issues as well as the notes issued by Congress in borrowing for war purposes depreciated to small fractions of their face values. In other words, the country lacked its own currency and Congress had no power to provide it. Furthermore, it had no power to prevent what businessmen regarded as excesses of democracy when state legislatures enacted various kinds of measures to relieve debtors from the obligation to pay their debts.

Various attempts were made to amend the Articles of Confederation at one or another of their weak points, but these attempts disclosed still another defect. An amendment could be adopted only by unanimous action of the thirteen states. For one reason or another no such unanimity could be achieved on any important point. Growing recognition of the need for constitutional reform led to a meeting of variously chosen state representatives at Annapolis in 1786. Not all the states were represented, however, and the chief function of the Annapolis convention was further to arouse sentiment for constitutional change and to bring about the official calling of a constitutional convention to meet at Philadelphia the following year.

The Constitutional Convention. When the Philadelphia convention met in May, 1787, it did so nominally for the purpose merely of proposing amendments to the Articles of Confederation. Most of the delegates, however, including prominent businessmen and political leaders from the several states, came with the expectation of doing more than propose amendments, and some of them appeared with drafts or partial drafts of new constitutions for presentation before the convention. Under the presidency of George Washington, with the active support of the aged Benjamin Franklin and other dignitaries, and with the earnest endeavors of James Madison, Edmund Randolph, and many other men of younger generations, the convention set about planning the basis for an entirely new central government.

Although not necessarily from any fault of its own, the Congress provided for by the Articles of Confederation had been losing prestige since the close of the war. The prestige of the state governments on the other hand, in spite of the alleged "excesses of democracy" in some of them, had grown. The Constitutional Convention set out to establish a federal government much more like the state governments than like the existing Congress. In the first three Articles of the new Constitution the framers provided respectively for legislative, executive, and judicial branches. They divided the legislative branch into two houses as in the states, and gave to the new Congress the much needed power to tax, to regulate commerce, and to coin money and regulate its value. They erected barriers against abuses by state governments by forbidding the states to impair the obligation of contracts and to issue bills intended to circulate as money, and by other provisions. They established the supremacy of the federal government in the area of the powers given to it by providing that the federal Consti-

tution, laws, and treaties should be the supreme law of the land, and that the judges in every state should be bound thereby, anything in the constitution or law of any state to the contrary notwithstanding.

The Convention, sitting behind closed doors, was the center of bitter conflict over many issues. The small states were content with the arrangement whereby in legislative matters each state had one vote. The large states wanted representation based on population. The Convention compromised by allotting two senators to each state, whatever its size, and basing the membership of the House of Representatives on population with the provision, however, that each state should have at least one representative. Slave-holding states wanted slaves counted in population totals for purposes of representation, but did not want them counted for the purpose of allocating direct taxes to the states when such allocation was made on the basis of population. The Convention compromised by counting three-fifths of the slaves for both purposes. Compromises were reluctantly agreed to on many other issues before the document was approved as the best that could be done under the circumstances. It was signed by thirty-nine of the fifty-five members. It was then submitted to Congress and Congress referred it to the states for consideration by ratifying conventions.

Adoption of the Constitution. Whereas almost all members of the Constitutional Convention had been interested in a radical departure from the Articles of Confederation, the memberships of the state ratifying conventions, even though limited by property qualifications on voting, could be expected to include people opposed to strengthening the federal government. Aware of this fact, the leaders of the Constitutional Convention collaborated on strategy to see that the Constitution was ratified. Three of them, Alexander Hamilton, James Madison, and John Jay, wrote in support of the new Constitution a series of articles which were republished as *The Federalist*, and which became a classic in the interpretation of the Constitution. *The Federalist* set forth the inadequacies of the Articles of Confederation, explained the operation of the proposed constitutional system, and attempted to show that the power given was adequately restrained and that the powers of the states were not improperly curtailed. Other leaders did important work in marshalling public opinion in behalf of the new Constitution.

Adoption was opposed on various grounds. It was widely apparent, as has been shown by Beard's *An Economic Interpretation of the Constitution of the United States*, that the stronger federal government with its restrictions on the powers of the states would help most big holders of property and most creditors, but would hurt the immediate interests of most debtors and small farmers. It would help those who needed firmness in law and government for protection of their property and their business privileges, but not those who needed governmental concessions or governmental aid in times of economic distress. The former group urged adoption of the new Constitution, while the latter opposed it.

In spite of strong opposition in some areas, the state conventions ratified one by one. Departing from the unanimity requirement of the Articles of Confederation, the new Constitution provided that it was to become effective upon ratification of nine of the states. Approval of the requisite number was achieved after James Madison and other leaders had agreed to support immediate adoption of amendments to provide a bill of rights. Friends of the Constitution had contended that there was no need for a bill of rights or a list of prohibitions against specified acts by government, since the new federal government would have only those powers granted to it by the Constitution wherein was to be found none of the provisions which a bill of rights would include. Some people feared that the broad grants of power to the federal government included more than met the eye, however, and furthermore in drafting state constitutions they had come to regard bills of rights as essential parts of such documents. They felt, therefore, that the new federal Constitution ought likewise to include such a list of prohibitions. So it was that the Constitution was ratified to go into effect in 1789, and the first ten amendments were adopted and became a part of the Constitution two years later.

FUNDAMENTAL CHARACTERISTICS

Since our constitutional system is the basis of government in the United States, all of the chapters of this book will deal in some sense with the fundamental characteristics of that system. There is point, however, in listing some of the familiar characteristics for brief discussion and in suggesting their significance by calling attention to the fact that under somewhat different circumstances they might have been very different from what they are. It is worth stressing that for very deep reasons we established a republic and a representative democracy rather than a monarchy or a dictatorship, that we resorted to the device of separation of powers within both state and federal governments, that we preserved a kind of enforced decentralization of government via the principle of federalism, and that our system reflects firm belief in the desirability of the rule of law. Let us consider these matters in a little more detail.

A Republican Form of Government. Although by way of establishing parliamentary supremacy our British forbears gradually deprived their king of most of his actual power, they preserved the monarchy for ceremonial purposes and Parliament still exercises authority in the king's name. The royal family is still revered by the British people, and time and money are counted well spent in maintaining the personnel, the ceremonies, and the trappings of monarchy. All this seems to give a sense of unity to the British people and to the British Commonwealth, and it seems even to personalize the sense of justice which the British constitution is supposed to reflect.

However much some Americans after the Revolution may have played

with the idea of heading the new nation by some kind of chieftain or royal house of our own, it was repugnant to most of our leaders and most of our people. For generations Americans had known little directly about the British rulers and most of what they knew was bad. The king had become a symbol of tyranny rather than of unity, of injustice rather than justice. The Loyalists who felt otherwise were in such a minority that they were fortunate if they could keep their sentiments to themselves or escape into Canada. While a part of the British Empire, we had lived so long without benefit of the more desirable characteristics of monarchy that we were determined to live also without the bad ones.

In the light of this attitude the British colonies, as soon as they became "free and independent states," set up republican forms of government. They were not direct democracies and only in part were they representative democracies, in spite of the fact that conservative people found the amount of democracy "excessive." Many of the states maintained voting qualifications based on sex, age, property, and other considerations, and still more restrictive qualifications were prescribed for officeholders.

The Constitution, instead of establishing voting qualifications of its own, adopted for electing members of the House of Representatives the voting qualifications of each state in electing members of the lower house of the state legislature. Members of the United States Senate were to be elected not by the people but by the state legislatures. It was expected that the President would be elected not by the people but by the Electoral College, or if election failed there, by the House of Representatives. Members of the Electoral College were to be elected as prescribed by the state legislatures, which might and often did mean election by the legislatures themselves. Here again, therefore, the form of government was far from complete democracy. It was a republican form, however, and further expansion of democracy was in the picture for the years ahead.

The Separation of Powers. The separation of legislative, executive, and judicial powers characterized both the state and federal governments. The doctrine of separation had been much discussed during the century preceding the adoption of the Constitution. American thinkers had read and discussed John Locke, an influential English political theorist of the late seventeenth century who, in addition to articulating for us the doctrine of natural rights which was written into the Declaration of Independence, persuasively advocated separation of the legislature from the executive, and maintenance of still another department for the conduct of war and foreign affairs.[2] A few decades after Locke, Montesquieu, a distinguished French theorist who also was widely read in America, argued that there could be no liberty when legislative and executive powers were united in the same person or in the same group, or when the power of judging was not separated from legislative and executive powers.[3] It has been sug-

2. See John Locke, *Two Treatises of Government*, Book II, Chapter XII.
3. See Montesquieu, *The Spirit of the Laws*, Book XI, Chapter VI.

gested many times in recent years that the Newtonian conception of an intricately balanced and mechanically operating universe, which was widely discussed during the eighteenth century, may have lent attractiveness to a conception of government by separated groups of powers which both checked and balanced one another.

It is impossible to measure the influence of theory from those various sources. Whatever the influence of abstract doctrine, it is an important fact that the people who framed our early constitutions were already familiar with and accustomed to the practice of the separation of powers. Throughout most of our colonial experience there had been separation between the colonial legislative bodies and the executives, who were usually appointed from London; and the judiciaries, if not as fully developed as the other two branches, were also to some extent distinguished. It was perfectly natural that in drafting state constitutions the framers should perpetuate with only incidental modification the characteristics of government with which they were already familiar. To trace the heritage of the framers somewhat farther back, it is worth noting that in his advocacy of the separation of powers Montesquieu illustrated in terms of the experience of Great Britain, even though in doing so he to some extent misinterpreted British institutions. The ultimate difficulty in the way of finding a genuine separation of powers in Great Britain lay in the fact that Parliament won the struggle so completely that it became the possessor not only of legislative powers but of executive powers as well.

Since exercise of the powers of government must be organized according to some pattern, division into legislative, executive, and judicial categories seems a practicable arrangement. There are relatively clear distinctions between making laws, carrying them into effect, and interpreting laws and applying them in particular cases. For these respective purposes it made sense to establish in each government legislative, executive, and judicial branches. Seldom, it is true, has the separation been prescribed as precisely as in the Massachusetts constitution of 1780, which includes the following provision:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.

While the federal Constitution incorporates no such specific statement, the doctrine is implicit in the arrangement whereby Article I is devoted to the legislative branch, Article II to the executive branch, and Article III to the judicial branch of the government.

The separation of powers was consistent not only with prevailing political theory and existing and familiar practice, but also with what the framers knew of their fellow men. They knew, as we do, that no drug and no beverage is more intoxicating than power over men and that intoxicated men are not to be trusted as unrestrained rulers. They may or may

not have known Lord Acton's generalization that "Power tends to corrupt and absolute power corrupts absolutely," but they would have accepted it without question. Men differ, it is true, in the degree of their wisdom and their capacity for self-control. Whereas some cannot manage even themselves alone, others are able to plan and to act for the welfare of society. Beyond some undefined point, however, no man is to be trusted with managing the lives of others. His power and his judgment must be restrained by the power and the judgment of other men. Such balancing of power and judgment takes place when legislative, executive, and judicial officers approach common subject matter from their diverse special areas. If the proper checks and balances are maintained no group is permitted to dominate, and the program of government is refined by consideration from the varied points of view.

The arrangement of our Constitution assumes, it is true, that there will be cooperation among the three branches of government as well as checking and balancing of powers. Without it the machinery of government would break down. Such cooperation does take place on a broad scale. The checking and reconsideration of program which takes place as a result of the separation of powers does at times interfere with speedy action and create a sense of frustration. A President who has a program to put into effect may resent the failure of Congress to enact the legislation or make the appropriations necessary for it. He may resent judicial decisions holding unconstitutional statutes on which his program depends, as did Franklin D. Roosevelt in the middle 1930's. Congress may resent the administration of its statutes by the executive branch of the government and may feel that administrative agencies are making policy which ought to be left to Congress. It may resent the interpretations given to statutes by both the executive and judicial branches and the action of the judiciary in holding statutes unconstitutional. The judiciary may with a profound sense of mission hold unconstitutional congressional enactments which seem to it to reflect bad policy, and it may resent congressional curtailment of its jurisdiction or presidential attempts to change the course of judicial decisions by appointment of new judges. These conflicts, which will be discussed in later chapters, are important. They should not, however, be permitted to obscure the fact that on most matters the three branches do work together and that governmental policy is often improved by the consideration which measures get from the different points of view.

The separation of powers seems to slow down governmental activity primarily when the matter under consideration is one with which the people are unfamiliar or in which they have little interest or about which they are sharply divided. Under such circumstances the people who do have an interest in the matter fight to control the conduct of government agencies, and the agencies either frustrate them by remaining inert or they move in various directions with differing lobby groups. For example, after a number of years of discussion and disagreement, Congress in the 1920's finally passed a measure to aid agriculture by dumping excess prod-

ucts abroad. President Coolidge indignantly vetoed the measure and its enactment was never completed. Disagreement between Congress and the President meant no program. Had the majority of the people wanted the program, however, and not primarily agricultural groups, it would have been enacted in spite of the President or with his approval. To take another example, both President Roosevelt and President Truman have urged enactment of legislation to develop a St. Lawrence Seaway, but Congress has not responded. There is strong support for such a measure by important groups, but there is also strong opposition by important groups. Inaction is the product not primarily of the separation between Congress and the President but of disagreement and uncertainty among the people about the matter. On the other hand, when the welfare of the people demands a declaration of war, or speedy enactment of an emergency economic program as in 1933, or aligning ourselves with the United Nations — that is, when the people know what they want — the separation of powers does not seriously interfere with their getting it.

Federalism. By federalism in the United States we mean allocation of certain powers to the central government with headquarters in Washington and reservation of other powers for exercise by the states or their subdivisions. It means more than merely the voluntary delegation of powers by the central government to local agencies. The government in Washington may authorize the exercise of certain powers by one of its offices in San Francisco, powers which may be recovered in Washington at any time; but such a procedure is not federalism. Within the meaning of that term certain powers must be fixed in the central government, whereas others must be permanently allocated to other governments in the same geographical area.

The Constitution reveals clearly the intention of the framers that our system of government shall remain federal and shall not be converted into a unitary system. Since only specified powers were given to the central government and residual powers were left to the states, the latter were not enumerated. While it was expected that broad jurisdiction would be left to state governments, state jurisdiction was not expected to stand in the way of full exercise of the powers delegated to the federal government. If the power of Congress to tax or to regulate interstate commerce encroached upon traditional fields of state activity, it did not become illegitimate for that reason.

In spite of the supposedly sound entrenchment of federalism, however, people concerned about preservation of the states have been fearful that the ever-broader exercise of granted federal powers would eventually eliminate most state jurisdiction. On a number of occasions the Supreme Court curbed the exercise of federal powers over commerce and taxation because of their alleged invasion of the province reserved to the states, disregarding the fact that only those powers are reserved to the states which are not given to the federal government — as the commerce power and the

taxing power most certainly are. One example was the child labor case, in which the Court held unconstitutional a statute regulating interstate commerce because it was employed to regulate child labor, a subject which, according to the Court, was by the Constitution reserved for state control. Another example was provided during the early New Deal period when the Court held unconstitutional a federal tax measure because it was used to regulate agriculture, a subject which, according to the Court, was reserved for state control.[4]

Since that time the Supreme Court has had a complete change of personnel, which has brought also a change in constitutional interpretation. In 1941 the Court declared that the Tenth Amendment — providing that "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people" — exercised no such restrictive power as had been attributed to it.[5]

Actually, the total of functions exercised by the states has increased rather than diminished, but the performance of functions by our federal government has increased at a far more rapid rate. It is this disparity which has created the impression that the federal government is swallowing up the states. It may indeed be true that many functions are centralized which ought to be handled locally. Excessive centralization results from lack of discrimination in determining what activities must be centralized, from normal desires to shift local functions to the federal government in order to avoid local effort and local expense, and from various other factors. A decline in the quality of citizenship is probably indicated when local areas shift the solution of their problems to a distant government. There ought to be a much more careful sifting of our various government problems to discover the extent to which local governments should solve them in the interest of local needs, local citizenship, and local community pride. In large part, however, the process of centralization is an almost inevitable result of the changes taking place in the economy and in our changing conceptions of the extent of the powers which government ought to exercise.

One warning ought to be posted. Opposition to alleged federal encroachment on state rights is not always to be taken at its face value. When a businessman or lawyer or member of Congress makes the rafters ring with his indignation at federal invasion of states' rights, he may not be really concerned about the states at all. His venom may well have been aroused by some regulation of business or agriculture or some tax measure which happens to have been enacted by the federal government, and not by the fact that it is the federal government rather than the states which enforces the regulation. Admittedly there was a long time ago a genuine and widespread concern about the submergence of the states by the federal government. It is to be remembered, however, that even that arch-nullificationist, John C. Calhoun of South Carolina, had advocated expansion of federal

4. *United States* v. *Butler*, 297 U.S. 1 (1936).
5. *United States* v. *Darby*, 312 U.S. 100 (1941).

powers for various purposes until he began to envisage the federal government as an instrument of the North for enforcing tariff legislation and restrictions on slavery which were detrimental to southern interests. Since the Civil War, however, there has been an element of deception in most arguments made in terms of states' rights. There is irony in the way in which conservatives among the Republicans, long the party of nationalism as far as curbing state powers was concerned, became the indignant defenders of the states when the New Deal sponsored a host of federal regulations of business. Their motivation was opposition to the regulations themselves, and not a desire to be regulated by the states rather than by the federal government.

The Rule of Law. Although it is the Massachusetts constitution of 1780, and not the federal Constitution, which prescribes "a government of laws and not of men," this intention is implicit in the federal Constitution as well. Government must not be the product of arbitrary decisions by government officers. It must be the product of law, of the Constitution and of statutes enacted by Congress. Powers must be applied not erratically to some people or to others as governors see fit, but uniformly to all people similarly situated. Control of some individuals by others is unbearable tyranny. Government of all according to the rule of the law, on the other hand, exacts but a legitimate price for the services which government provides. To insure that government shall proceed according to the rule of law, the Constitution includes outright prohibitions, some of them in the original text and some in the Amendments. For example, government may not directly infringe upon freedom of speech, freedom of the press, freedom of religion, or freedom of assembly. It may not subject any criminal to cruel or unusual punishments. In criminal prosecutions the federal government must resort to indictment by grand jury and trial by jury. It must use a jury in civil cases involving twenty dollars or more. Government must proceed always according to "due process of law," a phrase which courts define only as they apply it in individual cases. These and many other constitutional restrictions keep government in line for operation strictly according to the rule of law.

The kind of government we try to avoid when we insist on a government of laws and not of men is illustrated by a single item in the behavior of J. Parnell Thomas when a member of the House of Representatives and chairman of the Committee on Un-American Activities of the House. In questioning witnesses about alleged un-American activities he bullied them mercilessly. On one occasion when a newspaper man sought to protect his rights Thomas shot back arrogantly:

> The rights you have are the rights given you by this committee. We will determine what rights you have and what rights you have not got before the committee.[6]

6. *Hearings Regarding Communist Espionage in the United States*, House Committee on Un-American Activities, 80th Cong., 2d sess., p. 1310.

CHANGING THE CONSTITUTION

The Amending Process. Changes in the text of the Constitution of the United States can be made via procedures set out in Article V of the Constitution. The procedure followed in adopting the twenty-two amendments which have been made part of the Constitution included action by Congress with a two-thirds vote in each house, then submission of the proposed amendment to the several states and ratification by three-fourths of the states. Ratification can be by state legislatures or by state conventions, as determined by Congress. Although the original Constitution was ratified by state conventions, all amendments except the Twenty-First have been approved by state legislatures. Use of the legislatures for this purpose is more economical. On the other hand, resort to state conventions means that the delegates who pass on the constitutional amendment are more likely to have been chosen by the people with action on the amendment primarily in mind.

On application of the legislatures of two-thirds of the states, Congress is directed to call a convention for proposing amendments to the Constitution. No such convention has ever been called. Nor has there ever been at any time such a body of sentiment favoring constitutional change as to invite the calling of a constitutional convention which might, after the fashion of the Philadelphia convention of 1787, draft and propose for adoption an entirely new Constitution.

Like every other important governmental process, the amending process has its own technical procedures and its special problems. As in the Eighteenth, Twentieth, Twenty-First, and Twenty-Second Amendments, a provision may be included in the Amendment itself to the effect that it shall be valid only if ratified within a given period, in these instances a period of seven years. If at a given session a state legislature refuses to ratify a proposed amendment, it may at some later date reverse its position and enact a valid ratification. If on the other hand a legislature has ratified an amendment, it may not withdraw its ratification. Ratification by legislatures as provided for in the Constitution means literally ratification by representative assemblies. Even though a state may enact legislative measures by popular vote rather than by legislative assemblies, and may submit acts of state legislatures to the people for referendum votes, a constitutional amendment may be ratified only by the kind of representative body conventionally known as a legislature.[7] Like the enactment of statutes, the adoption of a constitutional amendment is easy or difficult, swift or slow in operation, depending upon the nature and extent of support and opposition. For example, Congress for many decades discussed sporadically the advisability of eliminating the "lame duck" session by changing the dates of meeting of each newly elected Congress. Finally a constitutional amendment was proposed to the states and leisurely approved by state legislatures. The Twenty-

7. See *Hawke* v. *Smith*, 253 U.S. 221 (1920), *Dillon* v. *Gloss*, 256 U.S. 368 (1921), and *Coleman* v. *Miller*, 307 U.S. 443 (1939).

First Amendment, on the other hand, which repealed the Eighteenth, or prohibition, Amendment, was proposed in a period of protest directed not only at prohibition but at the depression of the early 1930's and at social discomfort generally. As a result, the amendment was speedily ratified. While in the latter instance resort to conventions rather than to legislatures may well have speeded the ratification somewhat, the dominant drive came not from the mechanism used but from public sentiment.

The Existing Amendments. Of the existing Amendments, the first ten, proposed en bloc and made part of the Constitution in 1791, include prohibitions against various types of action and statements of procedural requirements which are commonly called the Bill of Rights. Congress is forbidden to interfere with various freedoms; the use of juries, adherence to due process of law, and other procedures are required; and certain rights are reserved to the states and to the people.

The Eleventh and Twelfth Amendments also came so early in the history of the Constitution as to constitute virtually a part of the original document. The Eleventh gave protection to the states by forbidding use of the federal courts for suits brought against one state by a citizen of another. The Twelfth revised procedure in election of the President to conform more nearly with the original intention.

No additional amendments were adopted between 1804, the date of the Twelfth Amendment, and 1865, the date of the Thirteenth. The Thirteenth, Fourteenth, and Fifteenth Amendments, which became effective respectively in 1865, 1868, and 1870, were an outgrowth of Civil War issues; they gave freedom, rights of citizenship, and voting rights to Negroes. As will be discussed elsewhere, however, provisions of the Fourteenth Amendment were subsequently interpreted to give important protection to rights of persons and property and to corporations without reference to involvement of Negroes.

After 1870 no additional amendments were adopted until 1913, when two more were added. The Sixteenth Amendment of that date removed constitutional barriers to collection of a graduated income tax. The Seventeenth marked a step toward an increase in democracy by requiring election of United States Senators by the people of the respective states rather than by the state legislatures.

The years 1919 and 1920 brought two other amendments. Of these the Eighteenth, subsequently repealed by the Twenty-First, outlawed the manufacture, sale, or transportation of intoxicating liquors. The Nineteenth Amendment again broadened the suffrage base by providing that "the rights of citizens of the United States to vote shall not be denied or abridged by the United States or any state on account of sex." In 1933 were added the Twentieth and Twenty-First Amendments already discussed. Finally, in 1951, was added the Twenty-Second Amendment, which had been proposed in 1947, to the effect that no person should be elected to the presidency for more than two terms.

Pending Amendments. When Congress has proposed an amendment to the states it may be considered pending until the necessary three-fourths of the states have ratified or until the expiration of any ratification period which may be included in its text, or until there has been such passage of time or such change in the situation to be affected by the amendment that Congress and the executive would assume further steps toward ratification to be invalid. An amendment submitted in 1924, authorizing Congress to outlaw child labor, which was ratified by many states but never by the requisite three-fourths, might be considered still pending were it not for the fact that in 1941 the Supreme Court reversed an earlier position and held that Congress could regulate child labor via the commerce power.[8]

Early in 1950 the Senate, by the requisite two-thirds votes, passed resolutions for the proposal of two other amendments. The first, to guarantee women equal rights with men, was the product of many decades of intensive lobbying, primarily by a group known as The Woman's Party. The second and much more important of the two provided for elimination of the electoral college in voting for president. Neither amendment had sufficient strength to pass the House of Representatives, and both died at the expiration of the Eighty-First Congress.

OTHER METHODS OF CONSTITUTIONAL CHANGE

The Essence of Change. The Amendments to the Constitution thus far adopted consist largely of procedural changes, additional restrictions on the powers of federal and state governments, and expansion of the suffrage. These changes are of unquestioned importance. Yet in viewing the transformation of our constitutional system over the sweep of American history, we do not find its essence in the content of these Amendments, except perhaps in the expansion of suffrage. We find its essence in adjustment of the constitutional system from one adapted to a simple and largely agricultural economy in a largely isolated position to one adapted to a highly complex economy of mass production and distribution with major wars always in prospect. None of the adopted Amendments has very close relevance to this basic pattern of change. Furthermore, a great deal of change has taken place within the area of protection of rights which is not delineated by the provisions of existing amendments. We must look, therefore, to other techniques of constitutional change.

Again, it is to be recalled that the Constitution is not merely the document drafted in 1787 together with its amendments. To the extent to which it is also a pattern of organization and a body of principles, we must look beyond the document to find the processes of constitutional change. In doing so we find major changes taking place with the imperceptible gradualness of glacial movement.

8. *United States* v. *Darby*, 312 U.S. 100 (1941).

The Impact of Crises. There are, it is true, exceptional periods and events. The Civil War, for example, marked a great deal more in the way of constitutional change than that reflected in the Thirteenth, Fourteenth, and Fifteenth Amendments. It showed the power of the Union as a military instrument, it demonstrated the indissolubility of the Union, and it released the nation from the restrictions previously placed upon it by sectional differences so that it could use its concentrated power for development of the resources of a great nation. World War I made the federal government for the first time the coordinator of the production and distribution of material things and the wielder of a gigantic instrument in the form of military manpower. The depression of the 1930's and the New Deal marked a long sweep forward in the expansion of federal control over the economy and in recognition of broadened scope in federal responsibility for the general welfare. World War II consolidated the changes and made more obvious the trends revealed by World War I and the New Deal.

Congress and the Constitution. Since the Civil War, Congress has changed our constitutional pattern by the enactment of a tremendous amount of regulatory legislation based on the commerce clause, by changing the taxing system so that the income tax provides the major source of revenue, by regulating on the basis of the spending power, and by various other measures. It has enacted a vast code of laws for the government of the country and has established a network of control which bears little resemblance to anything existing a hundred years ago. This is not to say that Congress alone can change the written Constitution or that each newly enacted statute is to be regarded as a constitutional amendment. Congress can enact a new measure today and repeal it tomorrow without affecting the Constitution in any important sense. Real constitutional change comes when, for example, Congress over a period of years enacts a vast code of regulatory laws based on the commerce clause or on taxing clauses which establish a pattern, a code which, in fact as distinguished from theory, cannot be fundamentally changed. Under the commerce clause we have the Interstate Commerce Act for the regulation of railroads, the Federal Trade Commission Act for policing interstate business, the Federal Power Act for regulation of electric power in interstate commerce, the Federal Communications Act for regulation of telephone, telegraph, and radio, the Truth in Securities Act to regulate marketing of securities in interstate commerce, the Public Utility Holding Company Act for regulating certain aspects of holding company operations across state lines, and many other measures deriving power from the same constitutional source.

This network of statutes represents a trend in constitutional policy so deeply engrained that it cannot in any brief period be fundamentally changed. It is not that the written Constitution forbids the repeal of any or all of these measures. It is rather that the dynamics of the regulatory movement as a whole is such that in fact much of the regulation must go on. Again, as far as the written Constitution is concerned, there is nothing to

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UNITED STATES COURT OF CLAIMS
UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS
UNITED STATES CUSTOMS COURT
TERRITORIAL COURTS

prevent Congress from abandoning the income tax as a source of revenue and turning to other schemes of taxation. In fact, however, the economic system and our governmental machinery have been adjusted to major use of the income tax, and its abandonment is as unfeasible as if it were forbidden by the Constitution.

The Executive and the Constitution. The President and the executive branch of the government which he heads likewise changes the Constitution, or at any rate participates in that change. The President is the top officer among some 2,000,000 government employees who have positions in a complicated scheme of organization. Two million people with their families constitute a substantial segment of our society. The group is drawn from all states of the Union and has contacts all over the country. Although none of these employees except the President and Vice President is elected, all of them are in a sense representatives of the people, parallel with our elected representatives. They are also a powerful lobby with interests and point of view of their own. In the face of pressure and competition from this group, the Congress, which consists of elected representatives, may have great difficulty in keeping in its own hands the task of making policy for the government. Our Constitution has been changed through the development of this huge aggregation of influential people in the executive branch.

It has been changed, furthermore, in that governmental responsibility for balancing the economy, promoting the general welfare, and maintaining adequate defense has immeasurably altered the responsibilities of the President. They have so enlarged his duties that he must have the use of new forms of organization, of men not only to do administration for him but to think for him on matters of policy. He must have around him men who in all but name must at times "be" the President, and must so integrate their thinking with his own as to avoid a split executive personality. Although the written Constitution has changed but little on the subject, there is little resemblance between the constitutional pattern of the presidency in the days of Andrew Jackson and in the days of Harry Truman. It has vastly changed and there is no possibility of return to what it once was.

The Judiciary and the Constitution. We have been accustomed to thinking of the judiciary, and particularly of the Supreme Court of the United States, as peculiarly responsible for constitutional change. This is true because the Supreme Court has the last word in saying what the written Constitution means. It has what is called the power of judicial review. The road to judicial review begins when Congress enacts a statute based on one of the general powers in the Constitution, such as the power to regulate commerce. The Constitution does not define its own terms; that is, it does not tell what it means by the commerce which Congress is empowered to regulate or how far the power extends. A person or corporation who feels that his interests are damaged by the new commerce statute may challenge

it in court on the ground that it is not a legitimate regulation of commerce and is therefore unconstitutional. When cases are brought before it, it is the duty of a court to determine what the statute means and whether its enactment is authorized by the Constitution. If it finds that the statute is not authorized, it holds the statute unconstitutional — which means that it can not be enforced. In this fashion the court determines the limit of constitutional power.

The judiciary becomes an instrument of constitutional change when the Supreme Court, whose constitutional interpretations all other courts must follow, expands, contracts, or otherwise modifies its interpretations of the Constitution. To illustrate again in terms of the commerce clause, down through the middle 1930's the Supreme Court so restricted its interpretation of the power of Congress under the clause that important New Deal measures were found unconstitutional. On the other hand, beginning with 1937, the Court expanded interpretation of the clause in case after case until in the 1940's measures were upheld which the Court in earlier years would not have dreamed of finding constitutional. With respect to the commerce clause and other clauses as well, it was incorporating vast new areas within the total area of federal constitutional power.

Finally, let us revert to a point already made. A constitution is to be understood only through knowledge of the people governed, their social heritage, and the entire pattern of their social organization. Adoption of identical written constitutions in two different countries would not necessarily mean identity of actual constitutional patterns. For illustration, the written constitution of Argentina has until recently been quite similar to that of the United States. Yet the governments of the two countries have operated very differently. Our government has taken much of its pattern from the common law tradition and from modes of conduct acceptable among English people throughout the world. It has been conditioned by a slow transition from a simple agricultural economy to an economy of mass-production industrialism. The Argentine government has had a shorter life. Its leaders are predominantly Spanish by descent. Their legal tradition comes from the Roman law system of continental Europe, which differs greatly from the English common law system. The country is less well developed economically than the United States. It has a wider range of climate and more diverse geographic conditions generally. Because of these various differences, and not because of differences in the two constitutions, the virtual dictatorship of Argentina under Juan Perón is very different from the democracy in the United States under the limited leadership of Harry Truman. Governments, to repeat, or constitutional patterns, derive their substance less from the work of constitutional conventions and from documents than from the character of peoples and the conditions amidst which they live.

References

Herbert Agar, *The Price of Union* (Houghton Mifflin, 1950).

Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (Macmillan reissue, 1935).

———, *The Republic* (Viking, 1943).

Edward S. Corwin, *The Constitution and What it Means Today* (Princeton University Press, 10th ed., 1948).

Edward S. Corwin and Jack W. Peltason, *Understanding the Constitution* (W. Sloane, 1949).

Carl J. Friedrich, *Constitutional Government and Democracy* (Ginn, rev. ed., 1950).

Alexander Hamilton, James Madison, and John Jay, *The Federalist* (available in many editions).

Homer C. Hockett, *The Constitutional History of the United States*, 2 vols. (Macmillan, 1939).

John Locke, *Two Treatises of Government* (available in many editions).

Charles H. McIlwain, *Constitutionalism Ancient and Modern* (Cornell University Press, 1940).

Andrew C. McLaughlin, *A Constitutional History of the United States* (Appleton-Century, 1936).

Montesquieu, *The Spirit of the Laws* (available in many editions).

Lester B. Orfield, *The Amending of the Federal Constitution* (University of Michigan Law School, 1942).

Clinton L. Rossiter, *Constitutional Dictatorship* (Princeton University Press, 1948).

Henry Rottschaefer, *The Constitution and Socio-Economic Change* (University of Michigan Law School, 1948).

Edward M. Sait, *Political Institutions: A Preface* (Appleton-Century, 1938).

Carl B. Swisher, *American Constitutional Development* (Houghton Mifflin, 1943).

Carl Van Doren, *The Great Rehearsal, The Story of the Making and Ratifying of the Constitution of the United States* (Viking, 1947).

Francis D. Wormuth, *The Origins of Modern Constitutionalism* (Harpers, 1949).

Benjamin F. Wright, *The Growth of American Constitutional Law* (Holt, 1942).

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Democracy and Citizenship

In every country, whatever its form of government, political power derives ultimately from the people. The most absolute dictator has dictatorial power only as he can use the potentialities of the people under him. Deprived of his people, he is like an engineer without an engine, a gunner without a gun. All government is therefore to a considerable extent self-government; it is the employment upon the people of the power which resides in the people. Since this is true, some critics contend that people inevitably get the kind and quality of government they deserve. While the contention has plausibility, it fails to show the human understanding which is needed to comprehend the problem. It would be a harsh generalization to say that a child who falls and hurts himself deserves his injury because he fails to coordinate his muscles in order to maintain an erect position. Nevertheless it is usually true that his injury results from inadequate control of his own powers; he is a victim of his own incompetence and not of malevolent designs on the part of the floor or chair that hurts him.

So it is that a society which suffers injury from the misuse or inadequate use of political power is ordinarily the victim, not primarily of some external oppressor, but of its own ineptitude at self-control. Europe did not run red with blood a century and a half ago merely because there was a Frenchman named Napoleon Bonaparte. Germany did not suffer Nazi oppression after 1933 merely because there was a man named Adolf Hitler. Various Latin American countries do not suffer oligarchic rule merely because men with the desire to be dictators are born among their people. The United States in the 1930's did not experience either the good or the bad of a New Deal merely because in the process of spurning Herbert Hoover the people elected Franklin D. Roosevelt to the presidency. The fault or the problem lies primarily within the society itself. Evil or stupid men win positions of power and succeed in perpetrating evil or stupidity only because of the inadequate capacity of people for controlling the exercise of their own power. Competent leaders succeed in exercising competent leadership only with the effective cooperation of enlightened people.

Because of broad differences in political capacity and political habits, governmental machinery must vary considerably from country to country.

The established pattern of government in any country is in an important sense its constitution. A constitution, when fully expressed in words, defines the offices of government, the manner of the exercise of political power, and the ends for which that power will be exercised. It can provide for government by an hereditary ruling house, by a dictator or oligarchy chosen in some other way than through heredity, or by the people themselves or their chosen representatives. The Constitution of the United States provides that the power of the people shall be exercised by the people, basically through a government of men of their own choosing. In the study of our Constitution, therefore, analysis of its democratic characteristics is of paramount importance.

THE NATURE OF AMERICAN DEMOCRACY

The Concept of Democracy. A democratic government is one in which the people rule. It is government *by the people.* In Abraham Lincoln's famous plea at Gettysburg, "that government of the people, by the people, for the people shall not perish from the earth," it is the second of the three phrases which marks the unique characteristic of our government. Every government is immediately or ultimately government "of the people." Any kind of government, whether monarchy, dictatorship, or democracy, may conceivably be for at least a time a government "for the people." But it is only government "by the people" which may legitimately be called democracy.

This definition of democracy is, of course, not accepted by many who use the term, as for example the leaders of the Soviet Union. Their definition is arrived at by a method of thinking entirely different from our own. Their thesis is that society is divided into two principal groups: the people on the one hand and their capitalist exploiters on the other. Having liquidated the capitalist exploiters in their own country, only the people and the people's party are left. Therefore, even though their present government is by far the most autocratic of any major government in the world today, they have no difficulty in classifying it as a people's government and a democracy. The difference between their use of the term and ours has in recent years been one of the innumerable sources of confusion and disagreement between their country and our own. It is not contended here that the United States has a right to dictate the meaning of political terminology to the Soviet Union or to any other country. The point is, rather, that if the word "democracy" is to have significance in explaining our own political institutions, the word must be used in the traditional sense of government in which the people do the governing.

It is not only the inhabitants of the Soviet Union who differ in some degree with the dominant American conception of democracy. Through much even of British thought runs the belief that democracy is government of the people by those most fit to govern. The impression has been widely held, and is not entirely absent even from the thought of the British Labor

party, that once the representatives have been chosen the political responsibilities of the electorate are suspended until the next election. It would be an exaggeration to say that the British masses leave governing to their betters and their betters leave it to the chosen government, but the statement would bear a significant amount of truth. Even in the United States there have been and are many people who contend that the responsibilities of the electorate end at the polls and who denounce what they regard as unjustifiable interference of the people with their chosen government.

This disagreement over the extent of popular responsibility ties in with another controversy — whether the framers of our Constitution intended to establish a democracy at all or only to establish a republic which made no pretense of being fully democratic. The question has been much debated. It was raised again during the New Deal period by Liberty League Democrats and by Republicans who opposed broad yielding to the rank and file of the people and adoption of measures for the benefit of the masses at the expense of owners and managers of property. The Constitution, they contended, provided not for a government by the people but one by representatives chosen directly or indirectly by the people; once in office, the representative ought to act for the good of the country and not merely to satisfy the desires of undisciplined and unthinking masses with no adequate knowledge even of their own long-range interests.

The language of the Constitution gives no direct answer to the question. It contains no mention either of a democracy or a republic. It is true that at the time of its adoption and for some decades thereafter the word "democracy" was in bad odor. "It connoted the rule of the mob and the tyranny of the demogogue who steps to power on its shoulders."[1] Democracy was thought of as undisciplined and unrestrained; whereas in a republic the electorate and the non-voters were guided, coerced, and restrained by representatives who, in some degree at least, were superior to their constituents in wisdom and self-control. It is also true that throughout our history men in office have differed about the extent of their continuing responsibility to the people. Some have taken the position that they functioned merely as delegates and were obligated to do the will of their constituencies whatever their own convictions, whereas others have asserted virtual independence of the electorate for the period of their terms in office. The latter have sometimes had great difficulty in getting re-elected. At times, however, their firm and independent action may prove more consistent with the settled will of the people and more pleasing to the people than the frantic scurrying of others to keep in line with shifting popular desires.

The extent of democracy in the United States — of government by the people — is also questioned because of the many prohibitions of governmental action which are included in the Constitution. Most of the amendments and many provisions in the original Constitution restrict or deny

1. Sidney Hook, "Is the U. S. a Republic or a Democracy?," *New York Times Magazine*, October 19, 1947, p. 17.

power instead of giving it. If the people are the governors, it is argued, then by these prohibitions they have tied their own hands. They have restricted government by the people. They have erected barriers against democracy. Therefore, the government is not intended to be completely democratic.

There are two answers to this contention. First, the constitutional barriers to action were erected not primarily to keep the people from doing what they want to do but to shield them against men in office who are entrusted with power over others. Their purpose was to restrain the representatives to whom power was delegated rather than the people over whom it was exercised. In the second place, there is no violation of the principle of democracy in an agreement among the people that they will not do certain things at all — as, for example, limit freedom of speech — or do certain other things except in prescribed ways — such as bring people to trial for crimes only after indictment by a grand jury. The Constitution is a compact among the people prescribing what may be done and how it may be done, and ruling out certain acts and procedures altogether. In such a compact there is nothing necessarily undemocratic.

Part of the strategy of our Constitution consists of a commitment to protect minorities generally against the harshness of majority rule — or even of well-organized minority rule which is at times achieved when the majority fails adequately to exercise its powers. There is nothing inconsistent with democracy in an agreement among the people that they will not completely override minority sentiments. True, as already indicated, mere constitutional prohibitions are not in themselves enough. There must be among the people a willingness to recognize and protect minority rights. It has been well said that

> The history of the two largest democracies in the world, Great Britain and the United States, seems to show that the most reliable check upon what De Tocqueville calls the "legitimate tyranny and holy injustice" of majorities is not an absolute veto by a minority, but the development of appreciation of the constructive function of minority dissent in a world where we cannot achieve final truth.[2]

American Democracy in Action. The people assert authority over their government and its officers in a variety of ways. The most direct method is in voting for candidates for office and, in state and local elections, voting for or against measures submitted for popular approval. Although the people make themselves felt by various techniques other than voting, most of these derive their potency from their ultimate effects upon election results. Some people seek election to office, and people organize to elect the candidates they want. After the election, voters attempt to control the conduct of elected officers by promises or threats of support or non-support at the next election.

Popular control of elected representatives, it is true, is not always crassly

2. *Ibid.*, p. 51.

coercive. It is not always, indeed perhaps not very often, a simple matter of "you vote for the bill I want enacted or I will vote for your opponent at the next election." Political pressure usually wears a soft glove over its mailed fist. It proceeds by "education" rather than merely by command. For every instance in which a spokesman for organized labor notifies Congressmen that wrong votes will mean electoral defeat, there are a thousand instances in which he attempts to show legislators that the labor point of view is the right one for the people as a whole and, therefore, the right one for Congress. The National Association of Manufacturers does not bluntly begin its opposition to regulatory legislation by announcing the number of votes it can poll against recalcitrant legislators. Farmers' representatives in Washington do not make demands for either congressional or presidential support primarily by issuing threats, but rather by stating agricultural needs which are related to the public welfare. Yet behind education and persuasion lies the prospect, and ultimately the direct threat, of reprisal at the ballot box if elected officials fail to heed the demands of the people. The sum total of popular pressure, distorted, it is true, by the fact that pressure is better organized in some fields than in others, tends to determine the actions of elected representatives and their appointees. To a considerable extent the people operate on their government to get from it what they want.

CITIZENSHIP IN THE UNITED STATES

The Problem of Emphasis. American political scientists have difficulty in analyzing the subject of citizenship because there are two highly diverse approaches to it, both valid for particular purposes. One approach stresses the functions of citizenship in relation to the operation of government, in relation to promotion of the public welfare. This approach is particularly significant when the writer is primarily concerned with the substance of democracy, with the effectiveness of democracy as a form of government. It is concerned with the quality of citizenship performance much more than with technical questions as to who are citizens and who are not. It is concerned much more with the obligations of citizenship than with the rights flowing from it.

The other approach is much more technically legalistic. It is concerned with how citizenship is acquired, how it is lost, and what rights it confers. In particular it usually involves detailed discussions of naturalization procedures, of such matters as how a child born abroad of American parentage can retain American citizenship and how a naturalized American citizen may by traveling abroad or establishing a foreign residence jeopardize his status as an American citizen or deprive himself of American protection, and so on. It is concerned with the rights of citizenship derived from the federal government and those derived from the states and with legal methods of protecting these rights.

Both approaches and both types of subject matter are important. Selec-

tion in each instance must depend on purpose. In this study, neither approach can be completely ignored. Since our purpose here is to study the relationship of democracy and citizenship, however, main emphasis will be on the first of the two approaches, on the character and quality of citizenship, while the methods of determining who are citizens in a legalistic sense and what rights they are entitled to will be summarized more briefly.

The Meaning of Citizenship. Of the well over 150,000,000 people residing in continental United States only some 3,000,000 are classified as aliens. The remainder are American citizens. They are the people who govern themselves more or less well in their own interests, who share the responsibility for the welfare of the nation, and who, in turn, have rights which are implied by the fact that they belong to a self-governing group. Citizenship, in other words, connotes participation in a group, responsibility for the welfare of the group, and rights within that group. In an attempt further to discover the meaning of citizenship, the distinction between "citizen" and "subject" has value. A subject is one who owes allegiance to a ruler. He has an obligation to serve that ruler. In turn, the ruler has an obligation to rule justly over his subjects and to protect them from external enemies. The word "subject" characterizes a man's relation to his ruler.

A citizen, on the other hand, does not necessarily have a ruler. His relationship is to his fellows rather than to a superior. He owes allegiance to his group rather than to a monarch. He may be at once the "subject" of a constitutional monarch and a citizen of a country, but the term "citizen" describes his relation to the aggregate of his fellows rather than to a higher authority. Long ago, when the American constitutional system was in its infancy, Justice James Wilson pointed out in a Supreme Court opinion that "under that Constitution there are citizens, but no subjects."[3] A citizen is like a subject in the sense that he has a place within a group, but the relationship is different. A subject is responsible to a ruler; a citizen and particularly a citizen in a democracy is responsible both for and to the people of his country. Attorney General Tom Clark illustrated the American attitude in the matter through the following anecdote:

> A friend travelling abroad was standing in line for customs inspection. He heard the inspector in clipped tone ask the man ahead, "Subject of what country?"
>
> The man to whom the question was addressed exclaimed, "Subject of no country. I am a citizen of the United States!"[4]

RESPONSIBILITIES OF CITIZENSHIP

Citizenship in a democracy implies a degree of responsibility which a person who is merely a subject does not bear. In a non-democratic country,

3. *Chisholm* v. *Georgia*, 2 Dallas 419, 456 (1793).
4. Address delivered at the Third Annual Conference on Citizenship, Washington, D.C., May 13, 1948. (Mimeographed)

the ruler and his henchmen do the planning and issue the orders, and the people have but to obey. In a democracy, the people themselves take command, and their well-being depends upon their efforts and their best judgment. Unless they provide good government for themselves, they do not have good government. To the extent that some of the people work for good government while others work against it or do not work at all, government will operate like an engine with one or more dead cylinders. To change the figure, the principle of democratic government calls for the participation of each citizen to the extent of his ability. If substantial groups of citizens refuse to contribute what they have to offer but merely "go along for the ride," the social mechanisms lack power and effectiveness to the extent of their non-performance.

Participation in Elections. The obligations of citizens fall into many categories. Prominent among them is voting in elections for which they are eligible. In most states, it is true, this obligation applies only to citizens who are over twenty-one. Even within that age group it applied until relatively recently only to male citizens. Within the group of more than 90 million eligible voters, however, exercise of the responsibility for voting intelligently is vital to the public welfare. Effective participation consists of a great deal more than marking random "X's" on a ballot or pulling down miscellaneous levers in a polling booth. The representatives to be elected must deal with problems of taxation, public health, housing, labor, agriculture, crime prevention, foreign affairs, and other matters. It is impossible to select a representative who can be counted on to do his work well unless the voter has some conception of the work he wants done and of how to find the right men to do it. Effective participation is difficult and time-consuming. Most people are busy with their own affairs and feel that they have no time to give to politics. It is much easier to stay away from the polls or to vote a straight party ticket without checking on individual candidates or to vote on one or two top names and let the rest go.

Apart from a few significant figures it is hard to compile the record of American citizenship at the polls, but enough is known to show that it is not one to be happy about. In 1940, for example, when the presidential election involved a hotly fought campaign between Franklin D. Roosevelt and Wendell Willkie and brought out a record vote, the total was only some 50,000,000. The possibility that some people were temporarily disfranchised because of moving from one state or locality to another, that others were ill, and still others were illegally excluded from the polls because of race, should not be permitted to obscure the fact that in a record election for the nation three out of eight citizens failed to vote.

Inclusion of millions of people in the armed services, where voting was difficult in spite of some provision for absentee voting, was blamed for the fact that the total presidential vote in 1944 dropped to less than 48 million. At the 1948 election, however, which followed the demobilization of the armies of World War II, the total vote was less than 49 million even though

the potential voting population had by this time increased beyond 93 million.[5] In other words, only some 52 per cent of the voters exercised their voting privilege in the presidential election. Some may have felt that the outcome was a foregone conclusion so that there was no point in voting. Some may have felt that the outcome was in any event a choice of evils in which they wanted no part. Whatever the cause, they permitted others to shoulder the responsibility which they themselves ought to have shared. True, perfection in voting performance is not to be expected in any heterogeneous community in which action is voluntary rather than enforced. A much higher percentage of voters goes to the polls in dictatorship countries. The voters there have but a single slate of officers to vote for, and they cast their ballots as they are told on all the issues on which they are told to vote. Our performance, whatever the figures on balloting, is on a much higher level.

Public Service. Whereas more than 90,000,000 people have the privilege of voting if they see fit to exercise it, only between 5,500,000 and 6,000,000 now have civilian employment in government at its various levels. In government as in other fields, the quality of performance depends in no small part upon the capacity and energy of employees. It would be comforting if it could be said that by and large the millions of government employees represent the intellectual cream of the population. There are high degrees of competence among many groups of government employees. For various reasons, however, large numbers of highly competent people steer clear of government service of any kind. Among the reasons are the comparatively low salaries and the lack of recognition except in the highest positions.

Important also, if less tangible, is continuation of the long-prevailing attitude that the most important goal in life is to look out for one's own interests and permit other people to do likewise. In a significant article published in 1948, David E. Lilienthal, then chairman of the Atomic Energy Commission, denounced that idea as obsolete. It was not enough for good citizenship, he declared, to keep informed on public questions, to remember to vote, and never to neglect putting waste paper at the curb during Clean-up-Your-Town Week. In addition, he argued, every man and woman to whom the country gave the privilege of a college education should actually spend a part of his life in some form of public service.

> In the next three decades I urge that every educated person, who is qualified to do so, plan definitely to set aside a number of years for the rendering of service in the legislative or executive branches of his local state or Federal government and that as nearly as possible this be full-time service.
>
> I am proposing a wide-spread rotation of the not-too-pleasant duties of the public service. And I do not mean merely part-time or "dollar-a-year" service alone. Nor in my opinion will it meet the situation to put this public service off until the people of this generation are of retirement age.
>
> I propose that, out of the best and most productive years of each man's

5. See figures compiled, *Congressional Record*, April 8, 1949, vol. 95, part 13, p. A2191.

> life, he should carve a segment in which he puts his private career aside to serve his community and his country, and thereby to serve his children, his neighbors, his fellow-men, and the cause of freedom.[6]

Not all people, it is true, have the political or intellectual capacity or the experience required to run for the presidency, or for membership in Congress, or to head a major governmental agency. Yet a George Washington with a sense of responsibility could not refuse to be President of the United States. A conscientious lawyer cannot always refuse to accept the salary reduction involved in a Supreme Court appointment. A conscientious businessman cannot always refuse to accept a government administrative office. To put the matter another way, the man who boasts that he will not seek or hold public office because the political game is too dirty or his associates too immoral or incompetent is in effect boasting of his own lack of responsibility as a citizen. The first step in the improvement of government personnel is infiltration with men of greater competence, not the dismissal of mediocrities.

Paying Taxes. Unlike voting and holding office, the payment of taxes for support of the government is enforced upon each member of the community. It is commonly regarded as one of the most burdensome duties of citizenship. Justice Holmes is said to have declared that he liked to pay taxes because in so doing he bought civilization. Most people are less philosophical about it. They definitely do not like to pay taxes even though they realize that without heavy payments the services they demand of government could not be rendered. It is generally assumed that only conformity to the absolutely inescapable requirements of tax legislation is required — that the citizen has no responsibility for policy in this field and for seeing that the chosen policy is made effective. Managers of big corporations see nothing wrong in spending thousands of dollars to find every possible loophole in tax legislation and administration. Government agencies responsible for drafting tax legislation are kept constantly on the run in attempts to repair the breaches in tax structure which resisting taxpayers have been able to find. It is commonly assumed that an exposure of the general lack of integrity in filling out individual income tax forms would constitute a shocking display. It is as if the American people had set for themselves a task in the way of planning public policy and raising money to execute their plans and then dared themselves to succeed in the face of their equally firm determination to find some way of avoiding payment.

Law Observance. What has been said about citizenship in connection with the payment of taxes can be said about it in connection with law observance generally. We have no obligation to preserve unchanged our present body of laws. We have no obligation to refrain from amending the

6. David E. Lilienthal, "For 'U. P. S.' — Universal Public Service," *New York Times Magazine,* June 27, 1948, p. 43.

Constitution if perchance some of its provisions prove to be antiquated. The preservation of an efficient democratic system, however, does require that laws be either obeyed or repealed. It marks a low order of citizenship when people refuse to play the game according to the rules and, at the same time, will not take the trouble to work for changes in the rules. It was an ugly display of political malperformance when in the 1920's hundreds of thousands of people flaunted their disobedience of federal prohibition legislation without making comparable efforts to get the legislation repealed. It reflects dangerous political sluggishness when a city or a state preserves on its statute books so-called "blue laws" for which it seeks neither enforcement nor repeal.

Military Service. Military service may under certain circumstances be an obligation of almost all adult citizens. Although military employment of women except on a volunteer basis has not yet proved necessary, the obligation would be clear if the necessity arose. As a matter of policy and out of deference for religious sentiments, conscientious objectors have in the past been exempted from combat service. The exemption merely reflects policy at the time, however, and not a constitutional requirement. When the survival of the nation is at stake, the private interests and even the private convictions of citizens may have to give way to the public interest, whether in matter of life or liberty or property.

THE RIGHTS OF CITIZENSHIP

The Right of Participation. Although it is true that the rights of citizenship have meaning only if the duties of citizenship are generally performed, the effective operation of democracy under the Constitution gives to these rights the meaning which for generations made the United States a haven of oppressed and liberty-loving people from other lands. Prominent among the rights of citizenship is that of direct or indirect participation in self-government, and the right to share in decisions on the kind of government we shall have and the functions it will perform. Citizenship does not, of course, imply either the right to conduct oneself as an anarchist or the right to establish oneself as a dictator. It gives only the right to share in decisions on government and not the right to govern in the face of majority opposition. It means on the one hand that no individual counts for everything and, on the other hand, that every individual counts for something.

While people may fail to exercise the right of participation even to the extent that, as in 1948, only 52 percent of the eligible voters cast ballots in a presidential election, existence of the right is deemed highly important. It means a great deal to know that one can vote and exercise his influence in other ways if he sees fit to do so. The burdens of government lose some of their weight for the citizen who participates in the decision to carry them. While the American Revolution was not fought exclusively because

the American colonies were taxed without being represented in Parliament, the slogan "no taxation without representation" touched deep emotions in the people. It is similarly true today that the people wish to have their say about taxes although they know in advance that levies must be heavy. If the country must engage in war, the costs in life and property and in the restriction of normal freedoms are less intolerable if decisions are made by a government subject to the will of the people. If government fails to meet ideal standards in preserving order, in protecting the public health, in providing education for the young, and in maintaining streets and highways, the irritations produced by its inadequacy are lessened somewhat by knowledge that the people themselves are ultimately responsible for the fact that ideal standards are not met.

The Right of Protection. The broad right of the citizen to protection by his government is among the most important rights of citizenship in any country. Clear discussion of that right as it exists in the United States is rendered difficult by two factors. The first is that, while protection is given to all citizens in the United States, the Constitution insures that such protection shall extend beyond citizens to include other persons who are not citizens. For example, it is persons, and not merely citizens, whose lives, liberties, and property may not be taken without due process of law. The second factor rendering clear discussion difficult lies in the division of power between the states and the federal government which leaves to the states the protection of certain citizenship rights while allocating others to the federal government. In general, the great body of private rights which are endangered merely locally and at private hands are subject only to the protection of the states. The federal government has broad power to intervene for the protection of such rights only when the state itself has infringed them or when local matters become involved with interstate commerce, federal taxation, the conduct of war, or some other national interest. To repeat, it is in general the states which give to the citizen, and to the alien as well, the local protections which are provided through the operations of laws applicable only to particular communities and administered through local police.

The protection given to citizens by the federal government is perhaps best illustrated by the aid given when the individual citizen is absent from the United States. He is ordinarily entitled to protection on the high seas and in foreign countries. American embassies and consulates go to great trouble to see that protection is given even though at times it may not be too richly deserved. The drunken or undisciplined sailor, the irresponsible adventurer, the over-zealous missionary, all of whom may act without adequate consideration for their own welfare or for the possibilities of involvement of their own country in difficulties with another country, have some right to the protection of their government if they get into trouble while away from home.

Within this country all citizens are entitled to the equal protection of

equal laws.[7] The people themselves determine what those laws shall be — whether, for example, they consist of legislation for the benefit of farmers, workers, industrialists, or other groups of the community at large. With the growing complexity of our social order, the federal government extends its powers further and further for the protection of the general welfare. In so doing it extends the number of rights for which the individual may claim protection. These rights go a long way to make citizenship worthwhile. It is for their realization that the duties of citizenship are assumed.

The community, then, to which citizens surrender part of their individual freedom, protects them against foreign enemies, against domestic enemies, and against chaos in the economic and social order. As we abandon *laissez-faire* concepts for others which call for positive action for preservation of the social welfare, government becomes in a positive way the guardian of the community. It is in these fruits of community action that the most important rights of citizenship are to be found.

Rights Against the Federal Government. It should be restated that the most important rights of citizenship are those which are created by the organization of the people into a working community, that is, by the establishment of community self-government. Included among these rights are those of participation and protection which were discussed above. Other rights may also become important, however, by virtue of possible need for protection against the government itself. Knowing from history and from their own experience the capacity of governors to govern unjustly, the framers of the Constitution and of its amendments incorporated important prohibitions against governmental action. To a considerable extent, it is true, these guarantees extend to all free persons within the jurisdiction of the United States whether citizens or not. But since the population has always been both in contemplation and in fact largely a citizen population, the rights in question may without serious error be classified as rights of citizenship.

Many although not all of these rights are listed in the first ten Amendments to the Constitution, often referred to as the Bill of Rights. Of prime importance among them are the rights guaranteed by the First Amendment — freedom of religion, freedom of speech, freedom of the press, and freedom of assembly. The Amendment forbids the federal government to impair these freedoms. The government has never set out deliberately to impair them, and presumably would have entered upon no such deliberate plan even if the Amendment had not been included in the Constitution. In the exercise of the power given to it by the Constitution, however, and particularly in the exercise of war powers, the government does inevitably encroach upon the area of individual freedom. When the nation's strength in men and materials has to be mobilized to insure survival, speech and

7. This is not saying that the Constitution has against the federal government an equal protection clause like that which restrains the states. There is no such clause. The principle derives from the character of the Constitution as a whole.

publication and assembly may have to be curtailed in exercise of war powers. Attempts to interfere with the successful prosecution of the war which have any chance at all of achieving any serious interference must be curbed. The difficulty is in drawing the line between such activities and the legitimate expression of ideas and legitimate criticism of government operations.

It was this kind of issue — the clash between the war powers given by the Constitution and the prohibitions of the First Amendment — which led the Supreme Court in a case decided shortly after the close of World War I to announce what has come to be known as the "clear and present danger doctrine." In terms of that doctrine, freedom of speech and freedom of the press can be curbed by Congress to the extent that exercise of that freedom results in a clear and present danger of bringing about evils which Congress has the constitutional power to prevent. In the language of Justice Holmes,

> The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right.[8]

It is extremely difficult, however, to draw a sharp line between the powers which the Constitution gives to the federal government and those which it denies. It is hard to measure private conduct so as to tell when it creates such a clear and present danger that the government may curb it in spite of constitutional prohibitions. In time of war, almost any statement critical of the American cause or of inefficiency in administration may seem to constitute a clear and present danger. Almost any characteristic which distinguishes a minority group from the mass of citizens may come to seem a legitimate basis for governmental discrimination. During World War II, the Supreme Court upheld measures by the federal government to segregate American citizens of Japanese ancestry and exclude them from certain areas on the west coast because of the possibility that their racial background would give rise to disloyal conduct.[9] The government went further and imprisoned large numbers of such American citizens in so-called relocation centers without having previously collected any evidence against them whatsoever to indicate any tendency toward disloyalty. While the camps in which the imprisoned people were held bore no resemblance whatever to European concentration camps other than that the prisoners were forcibly detained, such detention was widely regarded as a gross violation of the rights of citizenship. It was not until the military situation was well in hand that the Supreme Court passed upon these drastic meas-

8. *Schenck* v. *United States,* 249 U.S. 47, 52 (1919).
9. *Hirabayashi* v. *United States,* 320 U.S. 81 (1943).

ures. It then held that the measures were not justified by existing statutes, without saying whether they violated the Constitution.[10]

Difficulties in defining the constitutional rights of citizens appear in times of stress whether or not war is immediately involved. Conditions of strain, whatever their cause, promote intolerance of dissent of any kind. Such conditions therefore deprive dissenters of much of the protection which they normally have against excessive zeal on the part of government officials. After the postwar development of intense friction between the United States and the Soviet Union, for example, almost any criticism of conservative political doctrines and programs became suspect as communist in origin. Although he was sharply criticized by level-headed commentators, the Attorney General of the United States undoubtedly had substantial popular support when, in December 1947, he listed some ninety groups and schools in the United States as subversive.[11] The list was published without presentation of any of the evidence on which it was based. While it brought no formal punishment, it stigmatized and discredited the listed organizations and their members.

Invasions of rights of citizenship by the Committee on Un-American Activities of the House of Representatives were alluded to in the preceding chapter, where we quoted the peremptory statement of the committee chairman that "the rights you have are the rights given you by this committee." Such invasions violate the principle of the rule of law which is one of the fundamental characteristics of our Constitution. Investigating un-Americanism is difficult because there is no adequate definition of activities which are American and those which are un-American. Although there have been notable exceptions, such investigations tend to fall into the hands of men who are zealous advocates of a particular point of view, usually that of rigid and narrow patriotism intolerant of new or changing ideas. Investigations, therefore, tend to develop into unjustifiable persecution of difference and dissent. As will be indicated more at length in other chapters, there is apparently no way of protecting persons fully against the discomfort created by the questioning methods of congressional investigating committees. So intricate are the problems of constitutional duty and right that federal judges differ sharply over them and no resolution of the difficulties is yet in sight.

Rights guaranteed against the federal government other than those of the First Amendment vary in importance. Few cases have turned on the right of the people to keep and bear arms, for example, while the right to be secure against unreasonable searches and seizures of persons and papers and the requirements of search warrants for searches have a continuing importance in protecting suspected persons against the unrestrained zeal of government investigators. The requirements of indictment by grand jury in criminal cases and of trial by jury restrict procedure in the interest of defendants. Other provisions, and particularly the due process

10. *Korematsu* v. *United States,* 322 U.S. 214 (1944).
11. For the initial list see the *New York Times,* December 5, 1947.

clause, further extend that protection. Some of these matters will be discussed further in other chapters.

Rights Against the States. Under the Thirteenth Amendment, which outlaws slavery and involuntary servitude, the federal government has prevented various states from conniving at the virtual enslavement of Negroes, Mexicans, migratory workers, and industrial workers in various parts of the country. The Fourteenth Amendment gives broad protection against state action by forbidding abridgement of the privileges and immunities of citizens of the United States; the taking of life, liberty, and property without due process of law; and the denial to any person of the equal protection of the laws. On these prohibitions rests a great body of rights which have developed as cases have been brought to the courts. Oddly enough, the privileges and immunities clause of the Fourteenth Amendment has not been highly important. The reason is that the privileges and immunities of citizenship which the states are here forbidden to abridge have been held to be only those which characterize federal citizenship, as distinguished from the great body of rights which belong to the individual as a citizen of a state.[12] The Fifteenth Amendment has constituted a broad barrier to state action which would restrict political privileges. By these and various other provisions the federal Constitution restrains state impairment of a great complex of rights which the Constitution seeks to confer upon American citizens and, to some extent, upon other people who are permitted to reside within the country.

THE IDENTIFICATION OF CITIZENS

In ancient Greece and Rome, from which many of our political ideas were indirectly derived, the status of citizenship belonged to relatively small proportions of the population. To be a citizen was to be one of the elect. Since ancient times, and particularly in countries professing to be democratic, the status of citizenship has been conferred upon larger and larger proportions of the people. In 1940 more than 95 percent of the people residing in the continental United States were American citizens. Approximately one-third of the non-citizens or aliens were in the process of acquiring citizenship. In other words, although citizenship totals do not coincide exactly with population totals, the figures are very close indeed. One is, therefore, pretty much justified in assuming that the average person he meets on the street or on the highway is a citizen of the United States. This fact, it is true, tells us next to nothing about the quality of individual citizenship but merely helps with its identification. Neither does it tell us whether citizenship was acquired by birth or by naturalization, although here too figures help us with averages. The ratio of native born to naturalized citizens is approximately ten to one.

12. *Slaughter-House Cases,* 16 Wallace 36 (1873).

Citizenship by Birth. The Fourteenth Amendment to the Constitution provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Most of us, therefore, automatically became citizens at birth. We achieved that status long before we had the capacity to comprehend its meaning. We accepted it unthinkingly as we accepted our positions within our families. Some people, indeed, continue throughout their lives to accept it in this fashion, becoming conscious of it only if their American citizenship can be used as an argument in defense of rights which may be threatened.

This principle that citizenship is determined generally by place of birth is commonly known as the principle of *jus soli.* It competes with the principle once well entrenched in Roman law and known as *jus sanguinis,* that children born abroad owe their allegiance not to the place of their birth but to the country of their ancestors. Whatever the claims of other countries upon children born in the United States, the government protects those children as American citizens as long as they stay out of the jurisdiction of the other claimant. Little can be done to keep them out of the clutches of the other claiming country if they insist upon going there. The most recent serious problems of the United States in this field arose in connection with the dual claims of the United States and Japan to people of Japanese ancestry born in the United States. Apart from an exception made during the 1940's and discussed below, the United States refused to recognize the claims of Japan as long as the persons in question remained on American territory. Even so, pressure on these people from Japanese loyalists created considerable discomfort among them during World War II.

Citizenship by birth is not, however, conferred automatically upon all persons born in the United States, and it is not limited to persons actually born in the United States. Those born in the United States but not subject to its jurisdiction, such as children of ambassadors and other official representatives of foreign countries, acquire no American rights. On the other hand, under a considerable variety of circumstances, children who are born abroad of American parentage have a claim upon American citizenship.[13]

13. See the provisions of the Nationality Act of 1940 which reads as follows:

The following shall be nationals and citizens of the United States at birth:

(a) A person born in the United States, and subject to the jurisdiction thereof;

(b) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided,* That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(c) A person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has resided in the United States or one of its outlying possessions, prior to the birth of such person;

(d) A person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(e) A person born in an outlying possession of the United States of parents one of

Ships flying the American flag are for many legal purposes classified as American soil wherever they may operate. It has been said that during the period of Nazi ascendancy in Germany before World War II many people belonging to persecuted groups attempted to arrange cruises on American vessels so that their children might be born thereon and therefore have a claim to American citizenship and American protection, including the right of immigration into American territory. To those persons born in the United States and subject to its jurisdiction, the right of citizenship applies even though the parents may be aliens and not subject to naturalization.

Citizenship by Naturalization. People who acquire American citizenship other than by birth do so by a process known as naturalization. The Constitution authorizes Congress to "establish an uniform rule of naturalization." Congress may confer citizenship simultaneously upon large groups of people, as it did upon large numbers of the residents of Hawaii, Puerto Rico, and other territories, or it may do so through a process of admission person by person. The process of individual naturalization is carried on in federal and state courts according to procedure prescribed by Congress, largely as set forth in a measure known as the Nationality Act of 1940. The right to become a naturalized citizen was formerly limited to white persons, persons of African nativity or descent, and descendants of races indigenous to the western hemisphere. Immigrants from among the millions of Asiatic peoples were therefore excluded. Congress has recently extended the right of naturalization to Chinese and to persons of Chinese descent, however, and to persons of races indigenous to India. We seem to be on the way toward eliminating racial characteristics or place of residence as factors in deciding whether people may become naturalized citizens.

Naturalization requires for most people an initial five year period of

whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person;

(f) A child of unknown parentage found in the United States, until shown not to have been born in the United States;

(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: *Provided,* That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further,* That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

The preceding provisos shall not apply to a child born abroad whose American parent is at the time of the child's birth residing abroad solely or principally in the employment of the Government of the United States or a bona fide American, educational, scientific, philanthropic, religious, commercial, or financial organization, having its principal office or place of business in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation;

(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934. 54 Stat. 1138–39.

residence. Prescribed papers in application for citizenship and supplying relevant facts must then be filed, and at the end of another two years, the applicant may take an examination to determine fitness for admission to citizenship. The candidate must not be an opponent of organized government generally, an advocate of the overthrow of the United States government by force, or a member of any organization which takes such a position. Various other qualifications are also prescribed. The period of residence and other requirements may be abbreviated or eliminated if Congress so desires. Congress does speed up the process of naturalization in certain instances, as when naturalizing aliens who have served in the armed forces of the United States, or the foreign-born wives of American citizens. Citizenship acquired by naturalization is in all respects on a par with citizenship acquired by birth except that no naturalized citizen may become President of the United States because of the constitutional requirement that the President shall be a "natural born" citizen. Like the natural born citizen, the naturalized one, by virtue of the requirement of the Fourteenth Amendment, automatically becomes a citizen of the state in which he resides. National citizenship, in other words, is paramount and state citizenship is derived from it.

Loss of Citizenship. Since the Constitution itself proclaims the citizenship of all persons born or naturalized in the United States and subject to the jurisdiction thereof, the right of citizenship is a constitutional right and not merely one conferred by statute. A bona fide citizen of the United States retains his citizenship throughout his lifetime and cannot be deprived of it unless he commits some act of renunciation. During the early years of our constitutional history there was conflict of opinion as to whether the right of an American citizen to renounce his citizenship and become a citizen of another country should be recognized. The ultimate decision was to recognize the right of expatriation.[14] It is now possible for an American citizen to abandon his citizenship by becoming a citizen of another country.

Other than by naturalization in a foreign state, an American citizen may lose his citizenship by taking an oath of allegiance to a foreign state, by serving in the armed forces of a foreign state without authorization from the United States, by performing services for a foreign state for which only nationals of such a state are eligible, by voting in foreign elections to determine sovereignty over foreign territory, and by making a formal renunciation of American citizenship while residing abroad. Congress has also provided that citizenship shall be lost as a result of conviction of desertion from the armed forces or of treason against the United States. The theory is not that citizenship is taken away for punishment of the crimes in question but rather that the acts in question constitute voluntary renunciation of citizenship. The Supreme Court has never passed upon the constitutionality of legislative provisions on this point.

14. See I-Mien Tsiang, *The Question of Expatriation in America Prior to 1907* (Baltimore: Johns Hopkins Press, 1942).

Until the period of World War II an American citizen could divest himself of his citizenship by making a formal renunciation only if he was outside the United States when the renunciation was made. Difficulties in handling American citizens of Japanese ancestry on the west coast during World War II led Congress to enact a provision authorizing formal renunciation by people residing in the United States. A considerable number of people of Japanese ancestry including aliens, citizens with Japanese sympathies, and citizens with sympathies for the United States, had been brought together in what was virtually a prison camp at Tule Lake in California. It was known that some of the people held were dangerous to American safety under the circumstances of war so that their release was inexpedient. Yet there was no constitutional ground on which American citizens who had as yet committed no offense could be kept permanently in prison. By giving the people who were loyal to Japan and who claimed by virtue of their ancestry to be subjects of the Japanese emperor the opportunity to renounce American citizenship, it became possible legally to intern them as enemy aliens.

Resentful of their imprisonment and persuaded and intimidated by pro-Japanese elements, more than 5,000 native-born persons of Japanese ancestry accepted the virtual invitation of the federal government to renounce their American citizenship. Most of them were imprisoned until the end of the war and a few were ordered deported to Japan. To protect themselves against deportation, some 2,300 of those who had renounced their American citizenship made application for its restoration on the ground that while illegally imprisoned they had been coerced and intimidated into renunciation. A United States district court in California upheld their plea and held that the renunciation should be cancelled.[15] Presumably, however, until the federal statute is changed it would be possible for an American citizen in good faith to renounce his citizenship while residing in the United States.

In times past, a great deal of confusion has arisen as a result of the different effects in different countries which marriage has had upon citizenship status. The marriage of an American woman to an alien man was once taken as a renunciation of American citizenship. This is no longer true. The woman retains her American citizenship even though by the law of the country of her husband's residence she becomes a citizen of that country as well. American women married to German men at the time of World War II retained their rights as American citizens in spite of the fact that they were also German citizens under German law.[16] They lost it, however, if they voluntarily accepted naturalization, taking an oath of allegiance to a foreign power.[17]

What has been said thus far about the loss of American citizenship has been in connection with American citizens born in the United States. The

15. *Tadayasu Abo* v. *Clark*, 77 F. Supp. 806 (1948).
16. See *Zander* v. *Clark*, 80 F. Supp. 453 (1948).
17. *Savorgnan* v. *United States*, 70 S. Ct. 292 (1950).

situation is more complicated when the citizen is born abroad but derives his citizenship from American parentage. The claim of such a person upon his American citizenship is less well fixed than that of a person born in the United States. In order to provide a claim to American citizenship in spite of foreign birth when both parents are American citizens, at least one parent must have resided in the United States or one of its outlying possessions prior to the birth of the child. If only one of the parents is an American citizen, that parent must have had ten years' residence in the United States including five years after reaching the age of sixteen. In such a situation, the child must reside in the United States or one of its outlying possessions for a period totaling five years between the ages of thirteen and twenty-one.[18] A child born either inside or outside the United States but of foreign parents is presumed to have expatriated himself if he remains for six months or longer within any foreign state of which either he or his parents shall have been a national according to the laws of that state. Such a presumption, however, may be overcome by the presentation of satisfactory evidence to the proper American officer of the intention to retain American citizenship.

Although citizenship by naturalization is in no sense a second class citizenship, the naturalized citizen, like the natural born citizen who was born abroad of American parentage, occupies a position which is more precarious than that of the citizen born in the United States. He loses his American citizenship by residing for two years in his native land if he thereby acquires citizenship in that country. Even if he does not acquire foreign citizenship, three years of residence will with certain exceptions terminate his American citizenship. Five years of continued residence in any other foreign state will with certain exceptions terminate his American citizenship.

Some people concerned with preserving the quality of American citizenship have argued that the right of naturalized citizens to retain their American citizenship should be measured by their conduct after naturalization. The position of the courts has been, however, that citizenship by naturalization has the same status as that by birth and is therefore not to be terminated merely because its holder does not measure up to a prescribed standard of conduct. The limitation upon this principle is that certificates of naturalization may be cancelled if enough evidence is found to show that the person involved never intended to become a bona fide American citizen and that his naturalization was infected with fraud.[19]

There is danger in permitting even this limitation upon the rights of a naturalized citizen. For it is possible that over-zealous patriots may be inclined to take any display of sympathy for the country of his origin as evidence that the naturalized citizen did not take his oath of allegiance to the United States in good faith. There is reason for suspecting that citizens of countries potentially hostile to the United States, including in times past

18. For quotation of the statute see note 13 above.
19. See for example *Knauer* v. *United States,* 328 U.S. 654 (1946).

citizens of various Fascist and Nazi countries, have secured American naturalization for the strategic purpose of aiding their own countries. Even so, these problems must be handled in such a way as to avoid persecution of bona fide naturalized citizens who continue to speak with a foreign accent and who have not lost all sentiment for their mother countries even though they have transferred their allegiance to the United States.[20] In order to enjoy all the rights of American citizenship, the naturalized citizen must have the same freedom of opinion, discussion, and action that a natural born citizen enjoys. The several opinions of the Supreme Court dealing with problems in this field indicate the desire of the Court to give full protection to that freedom.

Nationality. For purposes of simplification, the term citizenship has been discussed as if it were the only term characterizing people who owe allegiance to the United States. Actually, there is another term, "nationality" or "national," which includes all citizens of the United States and certain other people as well. Those other people are or have been inhabitants of outlying possessions of the United States to whom the full rights of citizenship have not yet been extended. A movement has been under way in Congress to confer American citizenship upon American nationals in American Samoa and certain other American possessions. If such legislation is enacted, the distinction between American nationality and American citizenship will for most practical purposes disappear.

IMMIGRATION

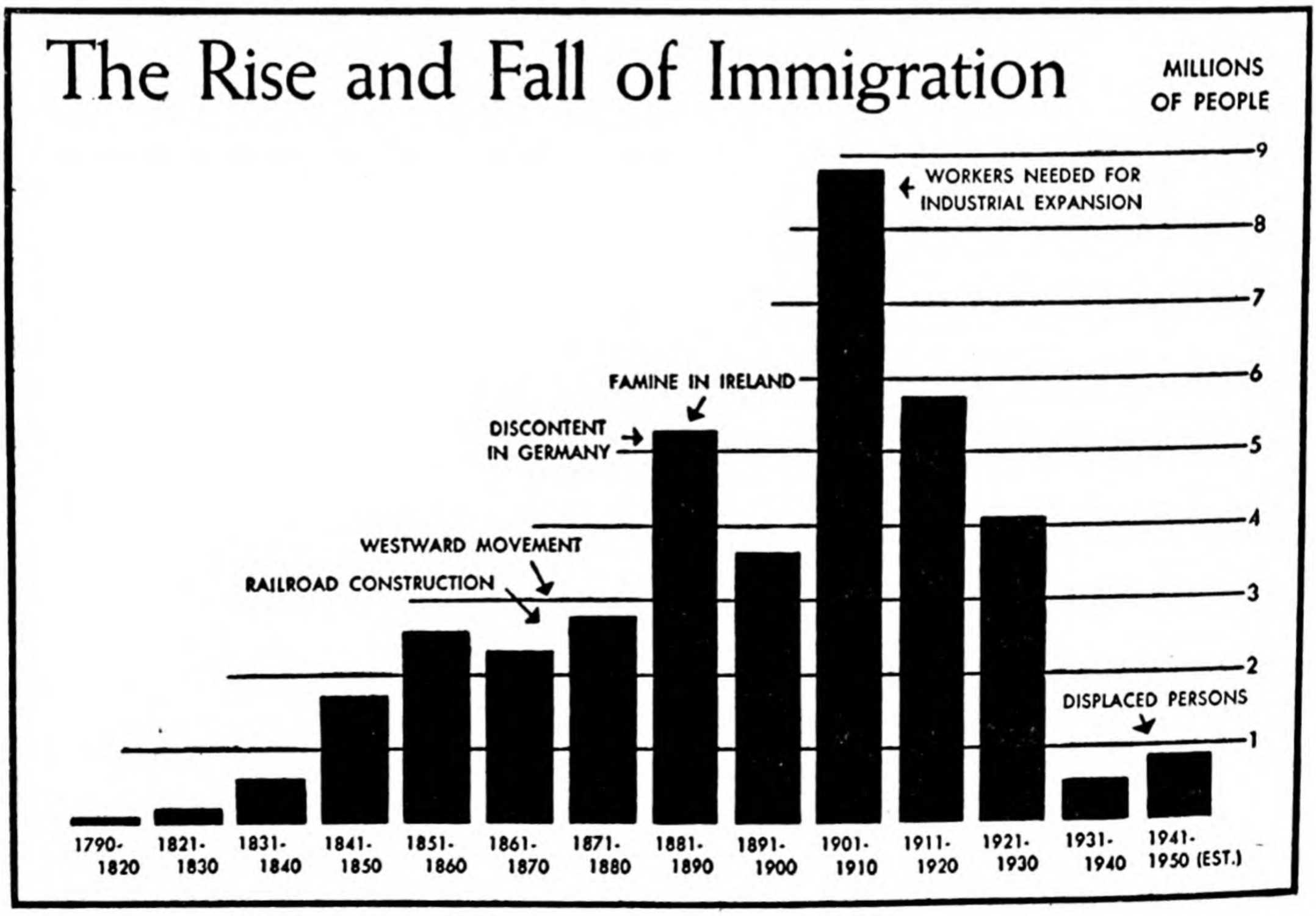
Standards of Admission. For approximately a century after adoption of the Constitution, the American attitude toward immigrants was in general one of welcome, particularly toward those who suffered oppression at home. Our country was a land of liberty, a land where diverse peoples got a new start and found release for their energies. It was a melting pot of cultures and nationalities. People who had the courage and energy to break with the past and leave their homelands were deemed likely to have the traits needed for the development of a new country. The undeveloped resources of the country were assumed to be boundless. Unsettled land seemed to spread endlessly toward the West. If perchance new people proved unpleasant neighbors, there was room enough to live without close contact with them. Employers in the eastern part of the country, furthermore, welcomed the continuing flow of immigrants because of the perennial inadequacy of the supply of laborers.

Although during the century in question the United States digested and molded into good American citizens European immigrants with highly diverse cultural and racial backgrounds, from the beginning a minority of American leaders thought that the United States should be largely reserved for Americans and the descendants of Americans who were already here,

20. See *Schneiderman* v. *United States*, 320 U.S. 118 (1943).

and that immigration should be sharply restricted. Labor groups began to resent the competition of immigrants. The combination of racial hostility with the opposition of American workers led in 1891 to legislation excluding the immigration of Chinese workers. As the frontier vanished before the westward sweep of civilization and immigrants had to settle in a more tightly packed society, opposition to unrestricted immigration grew more intense. It was sharpened by the fact that while the country had been largely settled by northwestern Europeans who in general welcomed more of their own kinds, the stream of later immigration was coming more and more from other nationalities in southern and central Europe which were regarded as harder to assimilate.

Broad restriction of immigration began with legislation enacted in 1917 and was worked out in detail with other statutes enacted in 1921 and 1924. Annual immigration from countries outside the western hemisphere is now limited to a total of 153,929 persons, exclusive of displaced persons to be discussed below. That total is made up by the allotment of quotas to the several countries, measuring the quota of each by the number of people of that nationality already residing in the United States. The national origins of the American people are such that this rule of apportionment gives the heaviest quotas to Great Britain and to Germany and other countries of western and northwestern Europe. During the period in which the United States was greatly reducing the flow of immigration, and particularly after the beginning of the depression in 1929, the United States seems to have lost much of its appeal as a place of residence for citizens of other lands. For a number of years the outgoing movement of foreigners from the



NUMBER OF IMMIGRANTS ADMITTED TO THE UNITED STATES, 1790–1950

United States exceeded the incoming. Not only the enactment of immigration restrictions but the experience of the country with wholesale unemployment advertised the probability that our capacity for digesting additional population was approaching exhaustion.

Displaced Persons. World War II developed a new aspect of the immigration problem. Hundreds of thousands of "displaced persons" in Europe had to seek new homes. Large numbers of them went to the new state of Israel which Jewish peoples had at last succeeded in establishing and to other countries of the world, but many also sought admission to the United States. Under similar circumstances a century ago, they would have been welcome. Now the American people seem to doubt their capacity to absorb such immigrants either economically or culturally. Among other things, experience has taught us that the achievement of full employment of our own people for a time may well be followed by wholesale unemployment at a later date and that the presence of large numbers of immigrants adds greatly to the welfare problem in times of stress. As a result of the predicament of displaced persons in Europe for whom there was deep sympathy in the United States, the American people were torn between their desire to preserve the cultural and economic integrity of their population and their sympathies for people in distress. President Truman urged enactment of legislation to authorize admission of large numbers of displaced persons without reference to the quota system, but it was not until 1950 that Congress enacted a measure of adequate breadth.[21]

Because of our traditional expectation that aliens admitted to residence in the United States will become American citizens by naturalization or at least will bring up families of American children, we have treated them very much as if they were citizens. For many years, indeed, they were even given voting privileges in some states. They were permitted to own property, to operate businesses, and to practice professions. These generalizations are still basically true, but some changes have taken place. Voting privileges are not now generally given. Some states restrict the right of aliens to operate businesses and practice professions which require license from the state. Aliens who are ineligible to citizenship, such as Japanese, are in some states denied the privilege of acquiring title to land. All aliens are required to register with the federal government and to keep the government informed of their residence and occupation.

When the United States is engaged in war, the scrutiny of individual activity which even American citizens undergo is far more intense for aliens. The privileges of aliens of enemy nationality are greatly restricted. As with some Japanese, German, and other aliens during World War II, the citizens or subjects of enemy countries may be interned without pro-

21. By a statute known as the War Brides Act, Congress sought to facilitate immigration of foreign women, including enemy aliens, who married members of the American military forces abroad. Without granting a hearing or disclosing the basis of its action, however, the Department of Justice may exclude any applicant for entry under the statute. See *United States* ex rel. *Ellen Knauff* v. *Shaughnessy*, 70 S. Ct. 309 (1950).

tection of judicial process. In actuality, the great mass of enemy aliens during the two world wars have been permitted to continue employment without suffering great inconvenience. They have usually been kept outside critical areas and occupations but have been encouraged to participate in useful production by using whatever skills and capacities they may possess.

In general, the treatment of aliens is characteristic of conditions in society which relate to citizens and aliens alike. To an ever increasing degree each person, whether citizen or alien, is dependent upon the activities of people around him and is expected to help preserve and promote community welfare. Neither the citizen nor the alien has the approximate self-sufficiency of the American pioneer. Each depends upon others and others, in turn, depend upon him. Each plays some part both as a producer and as a consumer in our mass production economy. This interrelatedness is not the product of the reasoning of social or political theorists. It is the product of the facts of mass production industrialism. The alien plays his part on sufferance of the United States. The citizen plays his part as a matter of right. Full participation as an American citizen implies living to one's fullest capacity for the welfare of the society to which all American citizens belong.

References

Max Ascoli, *Intelligence in Politics* (Norton, 1936).

Ernest Barker, *Reflections on Government* (Oxford University Press, 1942).

Carl Becker, *Modern Democracy* (Oxford University Press, 1942).

Carl Brinkmann, *Recent Theories of Citizenship in its Relations to Government* (Yale University Press, 1927).

Lawrence G. Brown, *Immigration* (Longmans, Green, 1933).

John L. Cable, *Loss of Citizenship* (National Law Book Co., Washington, D.C., 1943).

Jane Perry Clark, *Deportation of Aliens from the United States to Europe* (Columbia University Press, 1931).

Avery O. Craven, *Democracy in American Life* (University of Chicago Press, 1941).

Maurice R. Davie et al., *Refugees in America* (Harper's, 1947).

Frederick S. Dunn, *The Protection of Nationals; A Study in the Application of International Law* (Johns Hopkins Press, 1932).

Luella Gettys, *The Law of Citizenship in the United States* (University of Chicago Press, 1936).

Harold F. Gosnell, *Democracy the Threshold of Freedom* (Ronald, 1948).

Roger Howell, *The Privileges and Immunities of State Citizenship* (Johns Hopkins Press, 1918).

Milton R. Konvitz, *The Alien and the Asiatic in American Law* (Cornell University Press, 1946).

———, *The Constitution and Civil Rights* (Columbia University Press, 1947).

Arnold J. Lien, *Privileges and Immunities of Citizens of the United States* (Columbia University Press, 1913).

David E. Lilienthal, *This I do Believe* (Harper's, 1949).

Charles H. Maxson, *Citizenship* (Oxford University Press, 1930).

Charles E. Merriam, *The Making of Citizens* (University of Chicago Press, 1931).
———, *What is Democracy?* (University of Chicago Press, 1942).
Clyde B. Moore, *Our American Citizenship* (Scribners, 1936).
William E. Mosher (ed.), *Introduction to Responsible Citizenship* (Holt, 1941).
Wilfrid Parsons, *The First Freedom, Considerations on Church and State in the United States* (McMullen, 1948).
J. Roland Pennock, *Liberal Democracy: a Reappraisal of Its Validity and Prospects* (Rinehart, 1950).
Catheryn Seckler-Hudson, *Statelessness* (American University Press, 1942).
T. V. Smith, *The Democratic Tradition in America* (Farrar & Rinehart, 1941).
Laurence Stapleton, *The Design of Democracy* (Oxford University Press, 1949).
Alexis de Tocqueville, *Democracy in America* (available in many editions).
I-Mien Tsiang, *The Question of Expatriation in America Prior to 1907* (Johns Hopkins Press, 1942).
United States President's Committee on Civil Rights, *To Secure These Rights; The Report of the President's Committee on Civil Rights* (Government Printing Office, 1947).
Waldo E. Waltz, *The Nationality of Married Women* (University of Illinois Press, 1936).

6

Politics and Political Parties

The Constitution of the United States, like all written constitutions, leaves important gaps in the plan of government. It says nothing, for instance, about politics and political parties, nothing about the strategy, the tactics, or the art whereby the majority of the voters are to achieve agreement in selecting the people who are to operate the government. Certain it is that such agreement is not to be achieved spontaneously. Many voters would themselves like to be elected to important office, and turn to other candidates only as they accept the frustration of their first desire. The elimination of self still leaves a potentially large number of candidates. There must be some way of sifting second choices and third and fourth choices and so on down to the point at which a majority can agree on a single choice. The political processes involved are exceedingly intricate and the task enormously difficult. Since their successful operation is basic to the operation of government itself, the problem is on the level of constitutional problems. Yet the Constitution deals with it only in fragments and only at the outer edges.

The omission from the Constitution of matters which come under control of political parties resulted in part from the fact that the constitutional system is federal in structure rather than unitary; that is, instead of providing only for a single government it leaves to local determination many important matters even when they vitally affect the federal government. Electoral methods, both formal and informal, were already in operation in the states when the Constitution was drafted. Some of them were already well entrenched in sometimes differing local customs in the several states. Political machinery in Maryland, for example, was quite different from that in Massachusetts. It would have been hard to coerce the states into uniformity, and little benefit could have resulted from the coercion. In large part, therefore, the Constitution left the matter of elections to the states. The people in each state who were given the right to vote for members of the House of Representatives were those who in that state were permitted to vote for members of the most numerous branch of the state legislature. The times, places, and manner of holding elections for senators and representatives were to be prescribed in each state by the legislature

— with the power reserved to Congress to make or alter such regulations. The electors who were to choose the President of the United States were to be appointed in each state as the legislature should direct.

The task of defining the processes of politics was therefore delegated from the federal government to the states. The states prescribed the electorate — though later there were federal prohibitions against discrimination on the basis of race or sex. The states set up electoral machinery, with Congress reserving the power to alter and amend. In large part, however, the processes whereby candidates have been offered to the people and the people have been persuaded to vote for particular candidates have evolved outside the official operations of government and have been regulated by government only in part. The kind of regulation which was provided does not extend to the heart of the political process, whatever the detail with which government at one level or another circumscribes election and pre-election conduct.

So it is that provisions concerning political activities were largely omitted from the Constitution, not merely because the system established was federal but also because of the infinitely volatile nature of political behavior and the variety of established political custom. This does not alter the fact, however, that the politics of selecting government officials must make up an important part of the story of American national government.

THE NATURE OF POLITICS

Problems of Terminology. Although we make constant use of the terms "politics," "political," and "politician," they all have a slightly bad odor. We speak in dispraise when we say a man "plays politics." We condemn an appointment by calling it "political." We take something from a man's potential stature when we call him a "politician." Sir Ernest Barker calls attention to this problem of terminology in his thoughtful essay on "British Statesmen." Etymologically, he points out, there is no great reason for distinguishing between the politician and the statesman. The former term comes from the Greek language and the latter from the Latin. In the time of Aristotle the root words had approximately equivalent meaning.

> To Aristotle 'the politic man' was the highest type of statesman: a man with the power of directing public affairs in a 'polis' or city composed of free and equal members; a man who had been a subject before he became a ruler, and thus understood the art of being a subject as well as the art of ruling: a man, accordingly, who bore his high office with modesty and offered a shining foil to 'the despotic man' or dictator.[1]

In some way, between the time of Aristotle and the present day, the politician soiled his etymological nest. His professional label became a stigma. The Latin word "statesman" replaced "politician" as a symbol of repute in governmental activity. It was connected with Roman notions of

1. Ernest Barker, *Essays on Government* (Toronto: Oxford University Press, 1945), p. 20.

authority and sovereignty which are "less democratic than those which inhere in the original sense of the Greek word; but they are also more majestic." [2] To call a man a statesman is to imply sterling character, broad vision with respect to the welfare of the state, implacable determination in the face of enemies, and firmness in resisting the short-sighted pleas of his friends and of the masses of the people whom he serves from his vantage point of lofty loneliness. On the other hand, to call him a politician is to imply that he bends too easily with the winds of popular sentiment, that he engages in artful maneuvering to get the support of groups with conflicting interests, and that his moral fiber has been relaxed to permit a kind of moral double-jointedness in matters of government.

The Place of Politics. The degradation of "political" terminology is greatly to be deplored. Government "by the people" is not government by lonely gods on mountain tops. It is government by people on the farms, in the factories, and in the streets. It is not government by austere statesmen. It is government by distillation of the desires of the governed. Unfortunately, the desires of our more than 150 million, or of the approximately 50 million of them who sometimes vote, are not clear and sharp on most of the issues with which government must deal. Thoughts and feelings are conflicting and confused. The circumstances of the moment have a great deal to do with the shaping of political issues. Agreement comes only after an enormous amount of conflict among differing opinions, and if unaided, may come too slowly to be of any value when it arrives.

If we are to govern ourselves, therefore, the process of reaching agreement has to be facilitated, whether the issue be the selection of government personnel or the nature of governmental policy. We need midwives of public opinion. The democratic process must be aided by people who have the capacity to educate, to persuade, and to bring conflicting attitudes into agreement. People differ greatly in their capacity to harmonize conflicting sentiments. The personalities and social habits of some individuals seem to invite conflict rather than harmony. Others have no special interest in or ability for leadership of their fellows. In every society, however, there are people who have great skill and interest in finding the common elements in seemingly irreconcilable positions and in bringing about agreement where conflict seemed inevitable. They are facilitators of harmony, architects of public opinion. In other words, they are politicians.

Politics, then, is essential to government and the politician is an indispensable agent in our society. He is at once its mirror and its instrument. He is indispensable just as the physician, the lawyer, the teacher, and the businessman are indispensable. He may, it is true, do his work badly, he may use his talents to anti-social ends, he may strive exclusively for his own selfish advantage rather than for the public good; but so also may the physician, the lawyer, the teacher, and the businessman. Achievement of the good society will be in sight only when politicians do their work well

2. *Ibid.*, pp. 20–21.

and in terms of a high standard of public service, and not when politicians and politics are eliminated. The Biblical injunction, "If thy right hand offend thee, cut it off," is too drastic for application to an essential vocation which sometimes operates on a low plane, unless society as a whole is to give itself up as a bad job.

It therefore reflects superficial reasoning to praise statesmen by contrasting them with politicians. If a so-called statesman is to be something more than statuary on the one hand or a dictator on the other, he must be a skilled politician; indeed, even the achievement and maintenance of a dictatorship requires the exercise of outstanding political ability. The statesman is different from and superior to the politician only if we define statesmanship as political ability combined with a maximum of intelligent concern for the public welfare. We might, in other words, characterize the statesman as a politician of high moral rectitude with broad vision on the subject of the public good. In any event, political ability is prerequisite to statesmanship; it is necessary at all levels of social operation, whether or not its exercise may be classified as statesmanship.

The Practice of Politics. The process by which the politician practices his profession is intricate, varied, and complicated. We know altogether too little about it. Too much of what is written on the subject is devoted to unscientific chatter or to unrevealing or inadequately interpreted statistics. In some respects the political process is intensely personal. The people whose desires are to be coordinated and whose actions are to be guided think in highly personal terms. In large part they think about government personnel and policies as they themselves are immediately affected. Their hopes, fears, aspirations, and prejudices are usually involved. A prime characteristic of the successful politician, therefore, is that he shall be able to establish warm personal relationships with people. He must be able to win their affection and their trust. Greeting a voter with a friendly handshake and calling him by his first name may establish a great deal more confidence in a candidate than any number of formal arguments on political questions. With a warm grin, a cheery word, a reference to "my old friend," or the rich intonation of "My friends" in addressing an audience, Franklin D. Roosevelt gave a thrill which brought an ultimate response in election results. If the citizen likes and trusts an elected official he may permit some encroachment on his prejudices with respect to such issues as the protective tariff and price control. If the official is a cold and formal stranger, the smoothness of his logic will seldom make him popular or establish confidence in his integrity and good sense — although it must be admitted that there are men in whom coldness seems to suggest a kind of rock-ribbed integrity.

The politician is keenly aware of these finer shadings. In selling Franklin D. Roosevelt to the American people Jim Farley wrote thousands of letters to the people whom he met on tour, addressing them usually by their first names and wherever possible including a personal touch. He used green

ink for the signature so that it would be remembered because of its uniqueness.[3] When running successfully in the Spring of 1949 to fill a vacancy in the House of Representatives, Franklin D. Roosevelt, Jr., campaigned eighteen hours a day for several weeks in New York City, flashing the famous Roosevelt smile and talking with a voice which much resembles that of the late President. Hubert Humphrey, of Minnesota, showed himself an expert at the personal touch when in 1948 he ran successfully for the United States Senate. "When Humphrey spoke at a Townsend Club meeting in Minneapolis, he took time out of a busy schedule to dance with several delighted old ladies." [4] When successfully running for United States Senator from Tennessee in 1948, in a fight with the Crump machine, Estes Kefauver got acquainted with the people by a simple device. From the annuals of the University of Tennessee he listed the names of the people who had been in college with him and looked up their addresses. In every town he visited he looked for one of these people and asked to be introduced around. If no schoolmate was available he made the acquaintance of a reputable citizen, conversed with him a while, and made the same request. When the opposition denounced him as a "Red" with all the sneaking characteristics of a pet coon, he stirred laughter and won friends by protesting that the only thing red about him was his red-headed wife, and by carrying a live coon around with him and joking about it — until it misbehaved and had to be replaced by a coonskin cap.[5]

A politician is of course elected for the purpose of rendering service of some kind to the people. The member of Congress in Washington does a large amount of errand-boy work for his constituents, knowing that personal services often go further to demonstrate his good qualities to voters than do his more formal activities in connection with the enactment of statutes. The political machine in a large city derives much of its power from the good will of average people, good will which it has built up through varied services to voters and their families.

To some extent good will can be built up by the cold-blooded organization of benefits to constituents. It derives much of its effectiveness from the gratitude of the people served, however, and the appearance of personal warmth must usually be maintained. For that reason the person most likely to be effective in politics is the man who has a genuine liking for people. A fatherly attitude, an appearance of friendly good will, linked with the performance of actual services, may go far to prove fitness for office to the satisfaction of the voter largely without reference to conventional tests of statesmanship. Although the possession of a warm and friendly personality is no proof of ability to cope with intricate political and economic problems, the voter can often be led to feel that it is.

3. James A. Farley, *Behind the Ballots: The Personal History of a Politician* (New York: Harcourt, Brace, 1939), pp. 192–95.
4. Bradley L. Morison, "The Amazing Mr. Humphrey," *The Nation*, vol. 167 (October 30, 1948), p. 488.
5. Charles Edmundson, "How Kefauver Beat Crump," *Harper's Magazine*, vol. 198 (January, 1949), pp. 78–84.

While it is true that the people often elect to office men of good will who are anything but men of intellect and learning, and while this fact often gets in the way of good government, the fact should not be overstressed. Men who know more about political and economic doctrines than they know about people tend to take doctrinal rigidities too seriously. The public disapproval of professors in government is not completely unjustified. Human behavior is hard to mechanize. The delineation of the public welfare is not a matter of formal logic. Distinctions must often be made between substance and form. An issue which to the strict logician may look like a choice between two mutually exclusive alternatives may sometimes be resolved in such a way as to yield the essence of both. In other words, while it is true that conflicts among divergent desires of the people make almost inevitable the frustration of some of them, the amount of frustration will be much smaller than at first seemed probable, provided that adjustments are left to men with sufficient political skill. Although politicians are often denounced because they promise all things to all men without regard to consistency, men who are highly competent as politicians and reasonably competent otherwise can often go astonishing distances toward the fulfillment of such promises. Men without this ability will fail at such a task, however great their competence in other fields.

POLITICAL PARTIES

The Need for Organization. Simple group relationships require very little in the way of political planning. For the organization of an amateur baseball game, or amateur theatricals, or even of a club or a fraternity or a church, little more is needed than that the group to be organized contain a few people with an average amount of political ability. A few such people are present in almost every group. Almost automatically they come to the fore and are accepted by their acquaintances as group leaders in matters of organization.

In government, where groups are larger, where acquaintanceship is much less easily formed, and group needs are much more complicated, the need for political capacity and political services is also much greater. The automatic rise of satisfactory leaders and the automatic acceptance of those leaders are not to be taken for granted. Without a great deal of background preparation, for example, the millions of people living in New York City would be in no position to select the officials by whom they would be willing to be governed. They could not possibly know one another well enough for that purpose. The same thing is obviously true of most congressional districts, of states in which United States senators are chosen, and of the United States as a whole from which a President must be selected. Not only must the men of political ability be found and brought into the public eye, but the politicians must be organized if they are to perform even the minimum function of getting offices filled by the elective process. It is here that the political party serves an invaluable function.

As already stated, the Constitution is silent on the subject of political organization for the selection of government officials. Yet the history of political organization dates back into the pre-natal period of the Constitution. Local cliques in towns, counties, and states were even then operating from election to election with varying degrees of smoothness to get the names of candidates before the people and build up support for those candidates. The Constitution was barely on its way to the states for ratification when its advocates, the Federalists, began planning to elect the maximum number of men of their persuasion to the state ratifying conventions, in competition with opponents whom they called anti-federalists. Having secured ratification, the Federalists continued to work toward electing friends of the Constitution to federal office. They continued to do so at subsequent elections through the organization of the Federalist party.

In times past much has been said of the warning in the farewell address of President George Washington, the Federalist leader, against "the baneful effects of the spirit of party generally." He considered this spirit the worst enemy of popular forms of government: "The alternate domination of one faction over another, sharpened by the spirit of revenge natural to party dissention, which in different ages and countries has perpetrated the most horrible enormities, is itself a frightful despotism."[6] It must be remembered, however, that Washington wrote his farewell address at a time when factional bitterness was so intense as to threaten the operation of all political machinery. The bitterness was obstructing the give and take between people of differing beliefs and points of view which is an essential component of the process of democratic government. It was probably at this uncompromising factional spirit that his denunciation was directed, rather than at organization to persuade people to vote for particular candidates holding particular points of view.

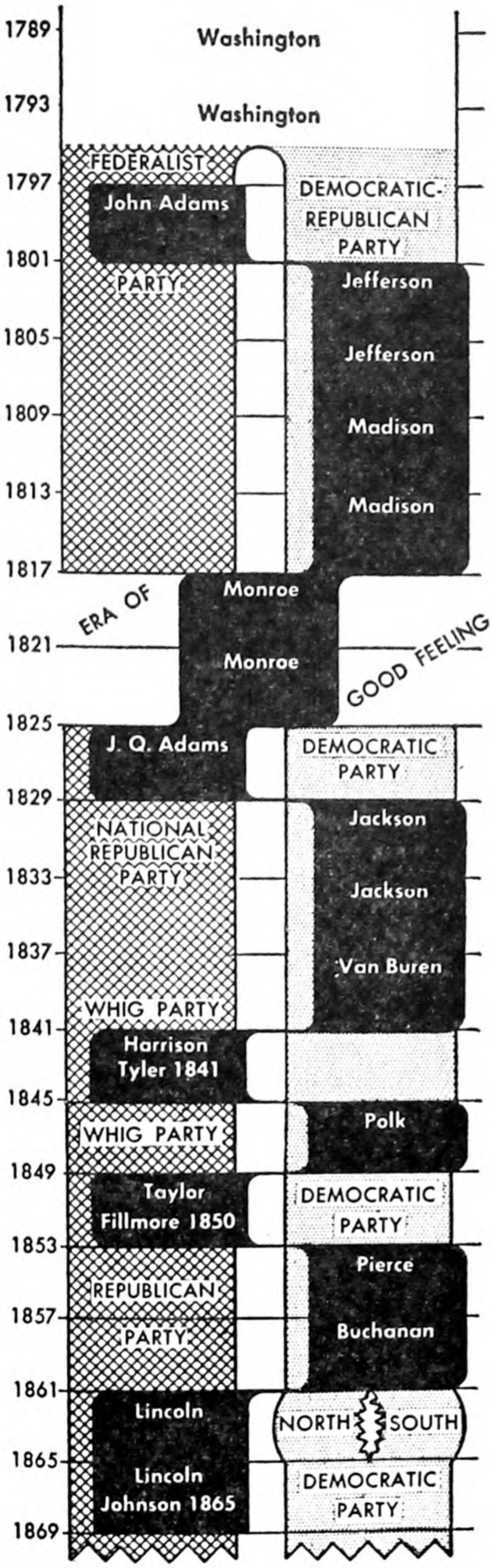
In any event, Washington's advice should be weighed against his practice, which included leadership of the Federalist party, the first great national political organization. If his animus was directed not at his own party but at any party which might oppose it, then the verdict of the American people throughout the life of our constitutional system has been against his position. The people have come to believe in the maintenance of political parties, not just one party but two. With two party systems offering competing slates of candidates and with the party out of power checking on and exposing the inadequacies of the current holders of office, the people can keep themselves relatively well informed about alternatives at ensuing elections. The party device has been accepted because it has proved indispensable for democratic purposes.

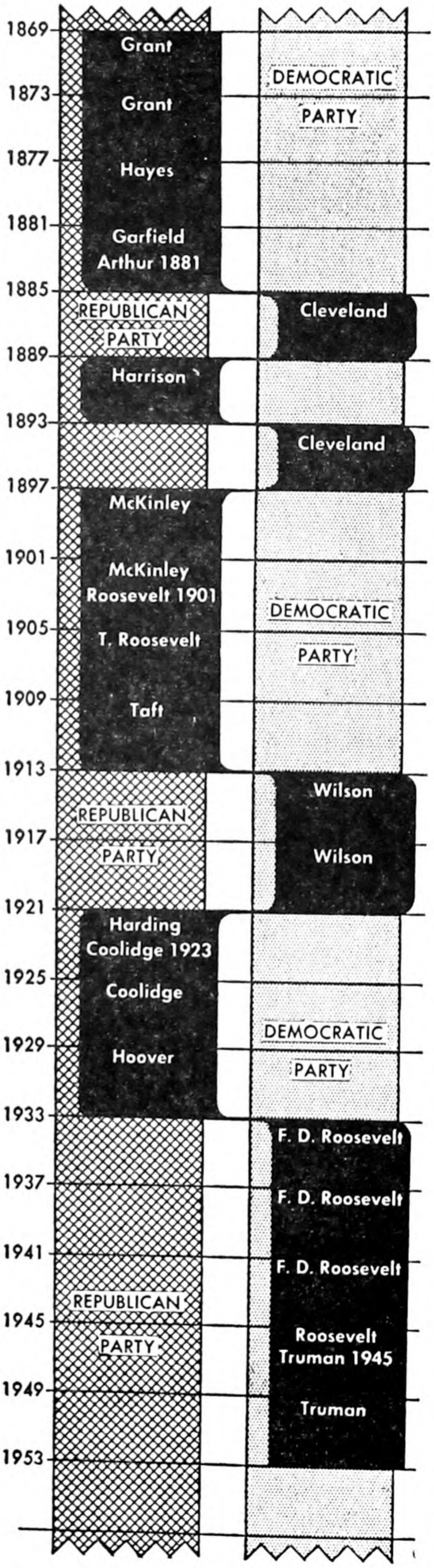
The Two-Party System. Since 1848 when the Whigs won the presidential and vice presidential election with Zachary Taylor and Millard Fillmore as their candidates, every presidential election has been won by the candi-

6. James D. Richardson (ed.), *A Compilation of the Messages and Papers of the Presidents*, vol. I, pp. 218–19.

Political Parties

AND THEIR PRESIDENTS





date of the Democratic or the Republican party. Only once within the last century — when in 1912 Theodore Roosevelt split the Republican party by running as the Progressive candidate — has a third party reached even second place. It seems apparent, therefore, either that the people are pretty thoroughly convinced of the value of a two-party system or that the system has fastened itself upon them without regard for their judgment.

Undoubtedly, there are many reasons why the Democratic and Republican parties have survived as major parties over many decades, whereas the many other contenders have operated only on a minor scale, and some of them for only brief periods of time. It is probably an important fact that each of the two great parties was formed at a time when the opposition was divided, with the result that it had the opportunity to win power and become thoroughly entrenched before it was ousted temporarily from office. The present Democratic party was formed under the vigorous leadership of Andrew Jackson during the 1820's and 1830's. For a time, indeed, it was widely known as the Jackson party, and its name was changed only when a change in presidential candidates made expedient the selection of a new title. Although the "panic" of 1837 discredited the party in power, resulting in the election of a Whig President in 1840, he died soon after taking office, and the poorly established Whig party, torn by internal strife, lost to the Democrats in 1844. The election of a Whig in 1848 was also followed by death in office, and the Democrats returned to power in 1852, to remain until the issues of civil war tore the party asunder.

So it was that, within the period of thirty-two years between the beginning of the first term of Andrew Jackson in 1829 and the despondent departure of James Buchanan from the White House in 1861, the Democratic party had ample opportunity to establish itself in the sentiments and the voting habits of large numbers of people. Because of this entrenchment and the ability to capture some local offices, the party was able to survive the ensuing twenty-four years when Republicans occupied the presidency.

Early Republican history somewhat parallels that of the Democratic party. When the southern states seceded from the Union shortly after the election of Abraham Lincoln as the first Republican President, the opposition was discredited and demoralized. Republicans remained in power until the election of 1884 when Grover Cleveland reestablished Democratic leadership, only to lose again to the Republicans four years later. Then, after Cleveland's second term, Republicans returned to power for four more terms. The Republican as well as the Democratic party, therefore, had during its early years the opportunity to put down roots which would provide sustenance in later years when external circumstances were less fortunate. When eventually it fell upon hard times many people were already voting the Republican ticket, as others were voting the Democratic, not for doctrinal reasons but because they had been born Republicans — or Democrats. This type of "born" membership constitutes a large and

indispensable bloc of each of the two great parties. It bears some resemblance, indeed, to membership which is virtually inherited by churches and other social organizations.

Similarities and Differences Between Major Parties. People who are more familiar with the doctrinal and class rigidities of European political parties than with the American experience are often disturbed by the fact that it is difficult to state the fundamental differences between the Democratic and Republican parties. The lines of distinction are indeed blurred. Apart from the accident of his having been born into a Republican or a Democratic family, it is often impossible to tell why a particular individual maintains loyalty to one party rather than to the other.

Even so, differences are not entirely non-existent. A difference in territorial strength derives from the fact that the Republican party got under way primarily as a northern party. In the early years its leaderships and much of its membership was anti-slavery; for that obvious reason it had no popularity in the pre-Civil War South. After the war it became in that area the party of the carpetbaggers and their white and colored supporters. Among the people of the dominant southern tradition, therefore, it was, and in some sections no doubt still is, something less than respectable to be a southern Republican. The Republican party in the deep South is always in a minority, and that minority is still further diminished by Democratic techniques of Negro disfranchisement.

For many decades the Democratic party was known as the party of state rights. This characteristic was in part the product of southern influence in the party. The South regarded itself as a minority region in the United States. For that reason its interests were thought to be endangered by the centralization of power in a federal government which was subject to northern control; it was better to keep a maximum of power in the hands of the states, where the dominance of outside interests could be avoided. The southern wing of the Democratic party was also partly responsible for a tendency toward differences on the protective tariff. At the time when the tariff was used largely to protect manufacturing against foreign competition, its advocates were largely among the big business interests of the country, whereas farmers and the producers of raw materials generally, who had to purchase manufactured goods from other groups and other sections of this country or from abroad, sought to keep tariffs down in order to enjoy the benefit of foreign competition with American manufacturers. By and large the Democratic party is still the party of lower tariffs, but the difference is still one of degree, and of no very high degree at that.

To the extent to which there has been a difference between the parties on monetary issues, Republicans have been for "sound" money whereas Democrats have listened to the blandishments of those who advocate free coinage of silver as a rival medium of gold; they have leaned toward the expansion of issues of paper money to the benefit of debtors and to the

injury of creditors, and, as during the New Deal period, they have sponsored devaluation of currency and government spending as methods of achieving national prosperity.

By and large in so far as there are differences, the Republican party has been the party of the well established, the rich, and the powerful, whereas the Democratic party has been the party of the insecure, the poor and the weak. Although workers sometimes vote in large numbers for Republican candidates, their home is mainly in the Democratic party, if they can be said to be at home in either camp. Radicals of all sorts are much more likely to make common cause with Democrats than with Republicans.

Innumerable attempts have been made to state succinctly and clearly the overall differences between the parties. Woodrow Wilson is quoted as saying that "the chief difference between the Democratic and Republican parties is that in the Republican party the reactionaries are in the majority, whereas in the Democratic party they are in the minority."[7] An able newspaper man has stated the differences as follows:

> If you want to restrict labor's privileges under the law, put Republicans in power. They will over-promise by a good deal, but they will try harder than will Democrats. If you want to reduce the federal budget, put Republicans in power. They will over-promise by a very good deal, but they will try harder than will Democrats. If you want to lower taxes, put Republicans in power. Again promise will exceed performance, but they will try harder than will Democrats.[8]

Late in 1947, as the 1948 presidential campaign was getting under way, a Gallup public opinion poll showed that the four major groups of the American people, professional and business, white collar, farmers, and manual workers, had majorities believing that the Democratic party could manage current foreign affairs better than the Republican party, and only the professional and business group thought that Republicans could better manage current domestic affairs.[9] A cross-section poll showed a majority of the people believing that Democrats could handle problems of high prices better than Republicans.[10]

The Republican party, as the party of people who have resources in reserve, has been known as the party which was willing to have difficult situations work themselves out in their normal course, without resort to questionable panaceas. As a result, critics have been able to characterize Republican policy as that of "do nothing and take its chances." In this connection the chairman of the Democratic National Committee in 1947 warned Democrats that their party would die if they allowed it to "become an afternoon edition of Republican practices." It could continue to win elections only if it stood for a positive program for advancing the welfare of the people.[11]

7. Quoted, Josephus Daniels, *The Wilson Era, Years of Peace, 1910–1917,* (Chapel Hill, N.C.: University of North Carolina Press, 1944), p. 11.
8. John W. Owens, "Vandenburg Versus Republicans," Baltimore *Sun,* Dec. 14, 1947.
9. *Washington Post,* November 23, 1947.
10. *Washington Post,* December 3, 1947.
11. *New York Times,* December 1, 1947.

Republicans, on the other hand, with indignation apparently deeply felt and not merely worked up for propaganda purposes, denounce year after year what they regard as the unsound political and economic doctrines by which their opponents attempt to interfere with the operation of economic laws and sound political principles. Doctrinal conflict between the two parties, indeed, dates all the way back to the conflict between the original Federalists and their opponents. Thus Abigail, the brilliant but authoritarian wife of President John Adams, who evidently agreed with her husband that property had equal sanctity with the laws of God, classified the followers of Jefferson — the counterpart of the Democrats of today — with infidels and atheists. If her language had had the potency of her desires she would have banished them from the country:

> Hence, wretches, to your native dens — the bogs of Ireland, the dens of Scotland, and the outcasts of Great Britain.[12]

Her attitude differed only in slight degree from that of some Republicans of the 1930's toward leading New Deal Democrats, whom they regarded as the embodiment of political and economic heresy.

Effects of Party Similarities. In spite of the varied differences between the two major parties, these differences are oftentimes less obvious and less important than their similarities. Birth as a child of Republican parents may determine party membership throughout life, but it does not necessarily condition economic needs and other factors which may affect attitudes toward government and its field of operation. Republican needs and Democratic needs may well be identical, with the result that party policies may be identical. Furthermore, however distinctive its program, a party will not be able to put that program into effect unless its candidates win office. It must mold part of its program, both as to promise and performance, for the purpose of getting into office and staying there. Therefore, if in certain areas a majority of the people want the same thing, a party may have to promise it to them and to give it to them if elected. Again, it must not be forgotten that although issues of governmental policy may be the dominant factor in the original establishment of a party, quite different factors may motivate its continued existence. Party workers have a stake in party survival quite apart from the achievement of a particular program. A considerable proportion of any party platform, therefore, is likely to be drafted not so much in terms of deeply felt principles as of the promises which seem likely to draw votes for the party ticket.

Even so, the student misses much of the significance of the political process if he becomes completely cynical about the fact that on many occasions the principle difference between the two major parties is that one party is in power and the other is not. There may be no important ground for major difference on important problems of public need; there may be

12. Stewart Mitchell (ed.), *New Letters of Abigail Adams* (Boston: Houghton Mifflin, 1947), p. 237.

only one right way to win a war or recover from a depression or irrigate a desert. There is, on the other hand, great value in having a choice between competing teams for administration of a program, whatever that program may be. People in office tend to lose sight of the public welfare. They tend to confuse their own personal welfare or their group welfare with that of society. They bog down in established routines and fail to adjust to new situations with proper facility. Nothing is more stimulating to good performance in office than awareness that unless performance is good someone else is likely to be occupying the office before long. While change in government personnel must not be so rapid as altogether to prevent utilization of experience in governing, posts which involve more than purely technical knowledge are likely to be better managed if they undergo periodic changes in occupancy.

Minor Parties. In spite of the tendency of major parties to promise all things to all men, there are demands of diverse groups in society which they cannot promise to fulfill because of the offense which such promises would give to other and more powerful groups. As to performance, it is seldom possible to live up to all the promises that have been made. Furthermore, in the competition for leadership some of the would-be leaders always get left out, or at any rate they are left with positions so low in rank as to be intolerable to their egos. When rejection by major parties results in affiliation between frustrated groups and frustrated leaders, the birth of a minor party may result. Between 1909 and 1912 President Taft demonstrated his inability to hold together the conservative and progressive wings of the Republican party. He aligned himself with the conservatives. Theodore Roosevelt, after having been President, found himself unable to serve happily in any lower capacity. Hence he accepted leadership of the progressive faction and split the Republican vote in the 1912 election, with the result that the Democrats captured the presidency.

Again, in 1947 and 1948, Harry Truman seemed unable to hold together the conservative wing of the Democratic party and parts of the New Deal wing, and he faced opposition from various groups which feared that leadership in both major parties had grown drunk with the exercise, or the thought, of coercive world power. Henry Wallace, rejected as a Democratic leader, believed profoundly in ideals which he contended were no longer adequately served by his party. He therefore accepted the leadership of a new "Progressive" party, with full knowledge that his party had no immediate chance of success. Republicans gleefully but inaccurately predicted that the "progressive" defection from Democratic ranks would result in a Republican victory. A southern defection of "Dixiecrats" offered the same threat to the Democrats. In spite of these defections, the Democrats stayed in power.

Other short-lived competitors enter the race from time to time. In 1924, for example, Robert M. LaFollette led a progressive movement somewhat similar to that led by Theodore Roosevelt in 1912. In 1936 William Lemke

led a so-called Union party. Progressive candidates and Farmer-Labor candidates have had sporadic success in local elections, but nothing more than that. The Socialist party appears perennially on both national and local ballots, with Norman Thomas as its long-time leader. The Communist party represents the most extreme of the radical fringes.

As already indicated, no candidate not a Republican or a Democrat has been elected to the presidency since the election of Zachary Taylor as a Whig in 1848. Why, then, do other parties continue to make the attempt? The reasons are probably many. Among them may well be the fact that among politicians as among other people in other walks of life, hope springs eternal. Theodore Roosevelt probably thought that he had a chance in 1912, and he succeeded to the extent of driving the Republican candidate into third place. Personal pique at rejection of leadership must at times play a part. Just as a rejected lover has been known to slay the woman of his choice to prevent her marriage to another man, so rejected politicians may at times prefer defeat of their party to having it succeed under other leadership. It is also true, as indicated above, that a minor party may win a certain amount of success at the local level even though it experiences national defeat.

There are still other reasons for resort to minor parties. Minority groups and minority leaders may find both major parties so blind or so corrupt or so inefficient as to render intolerable the thought of supporting them. There are times when both parties seem irrevocably committed to positions on vital issues which are dead wrong. Under such circumstances the minority voter may be unable to do anything but protest. Thus action through a minor party becomes a technique of registering dissent. If the protest vote proves to be small, it probably has little effect. If it proves to be large, major parties take it into account as they plan for future elections, knowing that the withdrawal of any substantial bloc of voters from either party may determine election results. In other words, it often becomes possible for strong minorities to modify majority programs. A sudden uprising on the part of a minority shocks a major party out of its lethargy. The steady polling of substantial blocs of votes at election after election, as by the Socialists, keeps alive among majority partisans the question of the possible dimensions of their liberalism. Both long- and short-lived minor parties, therefore, may contribute extensively to the kind of government the people want.

Labor and the Party System. Many admirers of the British party system and many friends of labor profess surprise that a political party dominated by labor has not developed in the United States. Here again the legitimate explanations are varied. Because the programs of both major parties are expected to evolve in terms of the desires of the people, it is assumed that existing parties can serve the interests of labor as well as a new party could serve them. Since labor represents a tremendous accumulation of political power, it can expect to make a heavy impact on both parties.

Neither can risk the neglect of labor interests. The strategy of the American Federation of Labor under the long period of leadership by Samuel Gompers was to play the two major parties against each other in the attempt to get maximum support from both. Gompers realized that whereas labor would be in a hopeless minority as an independent party, it could wield great power as a shiftable body of voting strength.

In large part the Gompers policy still continues. Labor leaders lobby for a pro-labor program in the government. They support friends of labor in either party. They watch the voting of members of Congress belonging to both parties and attempt to defeat at subsequent elections those who have voted for anti-labor measures, such as the Taft-Hartley law of 1947. True, the alignment of labor in recent years has been in large part with the Democratic party. The New Deal program included so many measures helpful to labor that the rank and file of labor leaders could hardly do other than support it. Even here, however, there were exceptions. John L. Lewis, who as president of the United Mine Workers supported President Roosevelt for reelection in 1936, felt that he was not adequately rewarded by Roosevelt and in 1940 shifted his support to Wendell Willkie, the Republican candidate. In spite of the fact that other labor leaders denounced the shift and that Lewis was unable to carry any large bloc of votes with him, the event has significant political implications. Labor, like any other group, will take all it can get from a political party. It will want more than it can get — unless the party surrenders to it completely — and will abandon the party in spite of past services if it finds advantage in doing so. In other words, the time will come when any party, however friendly to labor it may be, will find it necessary to yield somewhat to non-labor pressures and thus to antagonize labor to some extent.

So it is that in the long run a political party must look to its own welfare rather than to that of labor or any other interest group if it is to survive as a party. So it is also that labor must expect that sooner or later its interests, or its own conceptions of its interests, will be abandoned by any party that is not exclusively a labor party. If this fact seems to imply the desirability of establishing a party with only the interests of labor at heart, it must be remembered that in all probability such a party would remain indefinitely a minority party without power to elect officers and establish a program. Without the possibility of winning labor votes it could not be expected that the other parties would feel obliged to serve the interests of labor to the same degree even as now. In other words, unless on the one hand a group can win majority power, and unless on the other hand it receives little or no support from existing parties, service to its own interests is likely to dictate that it shall work within existing parties rather than establish a party of its own.

In spite of these facts, the growth of labor participation in politics is worthy of note. Powerful unions find ways of making themselves felt, in spite of limitations on contributions of money, which will be discussed hereafter. Recent elections have shown the development of the PAC, or

Political Action Committee, as a powerful instrument of the CIO in political contests. In times past it has done a great deal to determine the selection of pro-labor candidates, particularly in the Democratic party. The AFL created a similar instrument under the title of Labor's League for Political Education.

Party Organization. If it is to be effective in bridging the gap between voters and government a political party, like a government, must be organized for effective operation. It must have mechanism as well as membership. A party is, indeed, a kind of government in itself. It acts for the welfare of its membership or part of its membership, and it exercises varying degrees of authority over its membership. At the periphery its influence may be slight. At general elections people vote for its candidates or not as they please. They drift into membership in the party and out of it again with very little in the way of rewards or penalties for so doing. At the heart of the party organization, on the other hand, discipline is often severe. "Boss" Flynn, of the Bronx, has declared that a party organization is not only a machine but an army. As an army it must have discipline.[13] In general it can be said that since the adoption of the secret ballot the voter has been largely free from party control; the politician, on the other hand, he who would play a part in the work of the party organization in determining nominations and in sharing the fruits of victory, must submit to the control of his organization, must do as he is told.

Party mechanisms have a relatively simple overall pattern, but the pattern is filled out with such variations from section to section and party to party that the value of summary description is limited. At the federal level the basic organization is the national committee of each major party. Aligned with it are senatorial and congressional committees. At the head of organization in each state is a state committee. Under it are local committees, with jurisdiction largely worked out by the boundaries of the various electoral districts.

The function of each committee is to select candidates for government office and to get them elected. It must sell the candidates and the party to the people. This means, in part, that it must make the program of the party and the selection of candidates conform to the desires of the people — desires which, of course, the party will attempt to condition in its own interest. Committee members at all levels must have outstanding ability to persuade — they must be good politicians. They must be good not merely in their own eyes but also, and primarily, in their ability to get results. If they are to survive in their political positions they must win elections. Defeat at the polls is perhaps not the only unpardonable sin but it ranks high in the hierarchy of sinfulness. The ethical code of politicians, in other words, like the codes of people in other walks of life, is molded somewhat by the necessities of their particular profession.

The national committee, consisting in each major party of approximately

13. Edward J. Flynn, *You're the Boss* (New York: Viking, 1947), p. 76.

one hundred people, a man and a woman from each state and territory, is concerned with election of the President and Vice President. Because of the tremendous variety of interests to be harmonized, the paths to success and failure are less clearly visible than at lower levels and the opprobrium which comes with failure is much less deep. The members hold positions for four years and serve for the honor of the position or out of loyalty to the party, not for monetary compensation. They are always selected from among the party faithful, men and women who for many years have served the interests of the organization. The mode of their selection is not uniform. They may be chosen by the representatives of a state or territory in the national convention, or by state conventions, or through state primary elections. The chairman of the committee, who has great power during the course of a campaign, is selected by the presidential nominee of the party from among the most highly skilled politicians available. If he retires before the expiration of four years, as he is likely to do if his candidate is defeated and may do in any case, his successor is chosen by the committee, usually with competing presidential aspirants attempting to influence the choice. The other members of the committee aid in the campaign and in promoting the welfare of the party generally and share in the distribution of offices when victory is won.

A committee of approximately one hundred people with great variations in ability and attitudes is apt to be too unwieldy for effective action. The national committee therefore pretty generally limit themselves to annual meetings, and delegate most of the responsibility for central party management to an executive committee, or subcommittee, which may have from ten to fifteen members. The executive committee is always headed by the chairman of the national committee and includes other officers. It meets when the occasion requires, operating with the flexibility which is possible in a small group.

Senatorial and congressional campaign committees are nationwide committees which are concerned with the election of United States senators and representatives. They are less powerful and less well known than the national committee discussed above, and may have to derive financial support from it. They are more prominent in non-presidential election years, when they are less overshadowed by the national committee.

State committees vary in composition and activity from state to state. They have responsibilities in connection with state conventions and primaries and the determination of party membership. They collaborate with national, senatorial, and congressional committees in elections which overlap the several fields. If the multiplicity of organization results in some overlapping of functions it nevertheless makes possible a wider sharing of the work of the party and provides excuse for wider distribution of party offices among the faithful.

Finally, local organizations, jurisdictions, and activities vary so greatly as to make description almost impossible. Here again political organization tends to follow the lines of electoral districts, whether they be counties,

towns, cities, boroughs, assembly districts, precincts, wards, or some other organizational or jurisdictional unit. Here the organization comes into direct contact with the voter. Here is done most of the personal work of persuading voters to register with the party, to go to the polls on election day, and to vote for the candidates of the party. If they are to succeed in their work, precinct committeemen and other local party officers must engage in activities much wider than those which are specifically political. They must constantly endeavor to build good will for themselves and the party organization. To that end they establish clubs and bring people together for dances, picnics, boxing and wrestling matches, and various other social activities. They help voters and their families get jobs, find apartments, avoid entanglements with the law, and get out of various other situations in which the individual feels helpless when he must depend on himself alone. They build up reservoirs of friendship and gratitude. They use these reservoirs at election time by urging those who have been befriended to go to the polls and vote for the "right" people.

In local politics the party leader meets not only voters but contributors to party funds. Businessmen in cities have an interest in the way in which the city is run. They make donations to party groups they like or to groups whose conduct they hope to influence. When other things are equal — and sometimes when they are not — city contracts for street paving and other types of construction, and for all sorts of equipment, tend to go to the friends of the party who have demonstrated their friendship by making party contributions. At its worst this type of relationship results in gross scandals. Local political organizations — which inevitably play a part in national affairs — may deliberately harbor all sorts of crime because of party contributions from criminal organizations or the integration of criminal and political groups.

The fact should be emphasized, however, that there is nothing necessarily criminal or in any way discreditable about any aspect of the essential work of political organizations. Through service to the people they satisfy basic human needs. They provide a medium through which the people can get together for political action. If at times they abuse the human gratitude upon which they rely to win elections, they thereby disclose merely the defects of human organization everywhere. The conduct should be corrected, but the basic functions are not necessarily to be condemned. Certain it is that, in view of all the distractions that life provides, large numbers of people will fail to perform their political duties unless organizations of some kind concentrate on getting them to vote.

Machines and Bosses. A tightly knit political organization with control over patronage and effective linkage with business interests is called a machine. The connotation of the word "machine," like that of the word "politics" in its various forms, is usually that of something unpleasant and in bad repute. When the machine is under the control of a "boss" the connotation is likely to be even worse. A boss is a politician who grants

favors or controls those who grant them, who controls the votes of grateful people, and by means of his control of officeholders determines the conduct of government. Power of this kind has the intoxicating character of power everywhere, and the situation unfortunately invites corruption. All too frequently it exists where it is suspected, although the defeated rivals of the boss and the machine will pretend to have found it whether it exists or not.

The corruption of boss or machine rule results in periodic outbursts of popular indignation. Reform candidates are put in the field and are sometimes elected. Thereupon the reformers either build machines of their own, patterned roughly after those which they have denounced and defeated, or, more probably, find themselves frustrated in office because they lack the means for drawing continued support from the people. A complex society requires the activity of full time politicians as links between the people and their government as well as in the government itself. A reform movement usually has no such support. It is based largely on popular indignation, which tends to dissipate quickly after initial success at the polls. There is danger, therefore, that control may gradually revert to machines and bosses.

Because the survival of machines and bosses requires intimate linkage between politicians, voters, and business interests, these organizations and their leaders function most effectively in large cities. New York, Jersey City, Boston, Chicago, and Kansas City have been notable as boss-ruled areas. The name of Tammany Hall, machine headquarters in New York City, is almost as well known throughout the country as that of the city itself. Names of particular bosses in other cities — Hague in Jersey City, Kelley in Chicago, and Prendergast in Kansas City — are known almost as well. On occasion boss control extends well beyond city limits, and it may from time to time include most of a state, as did that of Platt in New York, Penrose in Pennsylvania, Hanna in Ohio, Long in Louisiana, and Crump in Tennessee. Boss control is harder to maintain in the larger areas, however, and not even temporarily has there been a boss who operated on a national scale.

Yet the fact that machines and bosses operate primarily at the local level does not render them unimportant for national politics. National elections cannot be won without votes. It is the local politician, operating in close contact with the people, who knows popular sentiment, knows how to influence that sentiment, and knows how to get voters to the polls. It is almost inconceivable that a national candidate could attract enough favorable attention to win an election without party support at the grass roots. The character of that support may vary from city to country and from city to city. It may be given grudgingly, but it must be given if victory is to be won. A disappointed leader near the top of the political hierarchy, such as Theodore Roosevelt or Al Smith, may "take a walk" without disastrous results to the party, but local political organizations must swing into line. For that reason a national candidate can seldom afford to denounce or

disregard a powerful municipal boss in his own party, however much he may dislike the boss's activities or methods.

Fortunately, perhaps, a boss knows the necessity for at least part time national success for his party if the party is to survive, and he often supports candidates whom he heartily dislikes, because of the practical necessity of doing so. Local politicians generally are well schooled in the necessity of supporting candidates who can win elections, whether or not they like the candidates in question. The following remark of an Illinois party henchman is said to be typical:

> I hate the — guts of the — — —, but I'm for him because maybe he can win.[14]

Submergence of self in loyalty to the party is therefore one of the outstanding characteristics of the local party politician. In a sense the politician at the top must have the same characteristic, but with him it must not be overdone. He must not be too completely schooled as a loyal follower. He must be an imaginative and creative leader as well. He must know how to change the rules of the game as well as to obey them. It is hearty collaboration between the loyal rank and file on the one hand and creative leadership at the top on the other that best animates the people with interest in the campaign. It is collaboration that does most to secure victory at the polls.

Party as an Instrument of Government. So far, the purpose of this chapter has been to introduce the subject of politics and political parties as a basis for more elaborate discussion in the chapters which follow. A further aspect of the subject needs also to be introduced. Many critics of the American political system contend that political scientists should not be content merely to describe the political system as it is. They contend that the system works so badly that something must be done about it and that political scientists and citizens generally should take matters into their own hands instead of leaving the management of politics to professional politicians. Some of them point to the British system in which it is contended that each political party stands for well-defined principles. The party in power in Great Britain, they contend, actually runs the government in terms of its own principles. It coerces elected officials into supporting the party program instead of merely catering to local interests and local constituencies. The party there, as an instrument of governmental power and not merely as an instrument for getting people elected and collecting the spoils of office, is eminently respectable. It draws into its service well-educated and well-trained people from the best families, who take pride in their political vocation.

The ineffectiveness of American political parties as instruments of government — as distinguished from their effectiveness in getting their candi-

14. Quoted, Joseph and Stewart Alsop, "From Cloister to Convention," *Washington Post*, January 16, 1948.

dates elected — is attributed to a number of factors. Among them are the following. The bed rock of party organization in the United States is local organization. Local party machinery is concerned primarily with local issues. Candidates who seek election even to state and national offices must concern themselves with the peculiar problems of their constituents in order to get elected. The diversity of local issues throughout the United States makes it next to impossible for candidates of the same party to take forthright positions on important issues and fight for them as party issues without reference to the attitudes of local constituents. For example, it may be highly inexpedient for a Republican from Massachusetts and a Republican from Iowa to take identical positions on farm problems, or labor problems, or problems of foreign trade. An argument which will win votes in Iowa may bring defeat in Massachusetts, and vice versa. A Democrat from Georgia who took the same position on civil rights for Negroes as a Democrat from Connecticut might well doom himself to political retirement.

This characteristic localism of American political parties means that the party in power in Washington, whether Republican or Democratic, is in many respects a hodgepodge of little parties and cliques rather than an integrated group equipped and ready to work as a unit for the application of a set of party principles upon which all members are agreed. While we do not have in Congress a long list of clearly differentiated political parties such as are to be found in various European governments, each of our two major parties is, in a sense, an aggregation of such minor parties. It is, therefore, not equipped to operate as an efficient instrument of government as does the party in power in Great Britain. Instead of acting as units and coercing all members into the support of party principles, our parties split in all directions on many important issues and therefore fail to serve as instruments of government.

Critics of our system, who are well represented by Professor E. E. Schattschneider, stress the inefficiency of such party behavior and its failure to articulate and achieve national purposes.[15] They contend that parties which are concerned primarily with elections and only incidentally with government tend to frustrate democracy instead of giving it expression. They would have each party develop and define its principles and stand by them. Thus by lifting the level of the party goal, and by other means as well, they would draw into the service of political parties educated and well-equipped young people who, under present circumstances, cannot be persuaded so to involve themselves in the turmoil of local politics as to bring about their own election to office. Instead of deploring the existence of politics and the influence of political parties, Professor Schattschneider would have the parties "take over the government as a whole." He argues that

15. See Schattschneider, *Party Government* (New York: Farrar and Rinehart, 1942) and *The Struggle for Party Government* (College Park, Md.: University of Maryland Dept. of Gov't and Politics, 1948).

> If we can invent and teach a working theory of political action to a substantial segment of the students in our institutions of higher learning, it is reasonable to hope that we shall produce at an early date a political nation able to make its government work.[16]

This type of argument as to the possibility and desirability of making sweeping changes in the character of political parties and in party personnel is being widely discussed in academic circles. Although practicing politicians seem not to be much concerned about it, the matter is well worth keeping in mind through the following chapters.

References

Wilfred E. Binkley, *American Political Parties: Their Natural History* (Knopf, 1943).

Hugh A. Bone, *American Politics and the Party System* (McGraw-Hill, 1949).

Denis W. Brogan, *Government of the People* (Harpers, new ed., 1944).

Josephus Daniels, *The Wilson Era, Years of Peace,* 1910–1917 (University of North Carolina Press, 1944).

Marguerite J. Fisher and Edith E. Harratt, *Parties and Politics in the Local Community* (National Council for Social Studies, 1945).

Harold F. Gosnell, *Grass Root Politics* (American Council on Public Affairs, 1942).

Pendleton Herring, *The Politics of Democracy: American Parties in Action* (Rinehart, reissue, 1947).

William B. Hesseltine, *The Rise and Fall of Third Parties; from Anti-Masonry to Wallace* (Public Affairs Press, 1948).

Arthur N. Holcombe, *The Middle Class in American Politics* (Harvard University Press, 1940).

Frederick C. Irion, *Public Opinion and Propaganda* (Crowell, 1950).

Frank Kent, *Political Behavior* (Morrow, 1928).

V. O. Key, Jr., *Politics, Parties, and Pressure Groups* (Crowell, 2d. ed., 1947).

———, *Southern Politics* (Knopf, 1949).

Harold D. Lasswell, *The Analysis of Political Behavior* (Oxford University Press, 1949).

———, *Power and Personality* (Norton, 1948).

———, *Politics: Who Gets What, When, How* (McGraw-Hill, 1936).

Kenneth C. MacKay, *The Progressive Movement of 1924* (Columbia University Press, 1947).

C. S. Magnus, *The Legal Status of the Negro* (University of North Carolina Press, 1940).

Charles E. Merriam, *The Role of Politics in Social Change* (New York University Press, 1936).

John Stuart Mill, *Considerations on Representative Government* (Holt, 1882).

Gunnar Myrdal, *The American Dilemma; The Negro Problem and Modern Democracy,* 2 vols. (Harpers, 1944).

Peter Odegard and E. Allen Helms, *American Politics* (Harpers, 2d. ed., 1947).

Howard R. Penniman, *Sait's American Parties and Elections* (Appleton, Century, Crofts, 4th ed., 1948).

E. E. Schattschneider, *Party Government* (Farrar and Rinehart, 1942).

———, *The Struggle for Party Government* (University of Maryland, 1948).

Murray S. Stedman and Susan W. Stedman, *Discount at the Polls; A Study of Farmer and Labor Parties 1827–1948* (Columbia University Press, 1950).

Arthur B. Tourtellot, *An Anatomy of American Politics* (Bobbs-Merrill, 1950).

16. *The Struggle for Party Government,* p. 5.

7

Nominations

The preceding chapter stressed the commonplace but important fact that the American people do not spontaneously rise up on election day and confer office upon unsuspecting citizens. Success at the polls is in general the result of hard work and the skillful use of political techniques and political machinery. Although in some communities elections for local offices are conducted on a non-partisan basis, nomination by a political party is usually a necessary step on the path to elective public office at higher levels. But party nomination is no more a spontaneous matter than is final victory at the polls. It comes about only after the slow grinding of a great deal of formal and informal political machinery.

Since no candidate who is not reasonably well known at the time of nomination is likely to be elected, no party, whatever its method of nominating candidates, is likely to choose an unknown person. The candidate must therefore have already won wide acquaintance. While he may have done so in some technically non-political activity, such as military service, the best evidence of a candidate's ability to win an election is the fact that he has won some other election in times past. Success in politics is the best preparation for more politics and the best proof of political ability. It is usually necessary, therefore, to enter party service at the foot of the ladder, to seek and win some minor office, and to move upward as reputation and acquaintance expand. The young man who has an eye on the governorship will first get acquainted with local party leaders, demonstrate his capacity for loyalty, then aim perhaps at a position as assistant district attorney, and then at a district attorneyship, which may serve as a stepping stone to the higher office. The man who has the United States Senate as his goal may first seek election to the state legislature and then to the House of Representatives.

Furthermore, however well-known and promising a candidate may be, the popular pressures which surround the elective process for at least the higher elective offices are so great that formal machinery for the nomination of candidates is essential. Modern elective machinery is our civilized substitute for the physical combat by which men in earlier centuries — and even some peoples of today — have settled issues of political power. Since

there are more than ninety million potential voters in the United States, and since a large percentage of those who vote belong to one or the other of two great parties, the selection of national candidates for each of these parties must itself represent a tremendous contest for power. Even at much lower levels of office — state, county, municipal and others — the pressures on behalf of competing candidates may be formidable. Here too, therefore, we must have acceptable machinery for resolving conflict in civilized fashion. It is the purpose of this chapter to discuss methods of party nomination, particularly for federal offices — the presidency, the vice presidency, and the 531 seats in Congress.

METHODS OF NOMINATION

The Caucus. Since political parties in the United States have always been rather loosely knit organizations with but vaguely decipherable cores, it is not surprising that their procedures of nomination have been variable and that they continue to change. Most nominations during the early years were made with a minimum of formal machinery. In spite of the assertion in the Declaration of Independence that all men are created equal, it was widely assumed that every community had in it a small group of "best people," and that these best people were best fitted to select the candidates for office. As political parties developed, the community leaders who were members of a particular party developed the practice of meeting in closed session in what was called a caucus to decide what names the party would present as candidates for office at the ensuing election. The pattern of the caucus varied from community to community and from time to time as circumstances changed. At the state level, where there was usually no such common agreement as to who were the best people and the rightful leaders as was possible in the local communities, the practice developed of permitting the party members elected to the state legislature to act as the nominating caucus for state officers. Similarly, at the national level, party representations in Congress selected presidential and vice presidential candidates.

The caucus as a nominating device had its good points but also its drawbacks. Its operation, whether at the local, state or national level, meant that candidates were chosen by people who were already in positions of power. It therefore tended to perpetuate the power of entrenched political cliques. In this respect it was fundamentally undemocratic. The growth of democratic sentiment, coupled with the resentment of the officeholders who failed to receive nominations at caucus hands, brought increasing opposition to a process which was denounced as "King Caucus" and created a demand for a form of nomination which would take public sentiment more fully into account. As a result, the first third of the nineteenth century marked a slow transition from use of the caucus to use of the party convention.

The Party Convention. Replacement of the caucus by the party convention was hailed as a victory for democracy. A local party convention at the county or municipal level, for example, might consist of all members of the party who cared to attend. At state and national levels, where full attendance was obviously impossible, it consisted of party representatives from the various localities. Resort to the convention as a substitute for the caucus was intended to transform general elections into competitions between popularly chosen candidates rather than between the candidates of self-perpetuating political cliques.

Our experience with the change from the caucus to the convention illustrates the abiding faith — often seemingly characteristic of the American people — that political problems can be solved merely by changes in machinery. The convention had possibilities. It might have become an assemblage of party members for discussion of the qualifications of candidates and the merits of issues, and for nomination of candidates in terms of their qualifications. But the rank and file of party members were unfortunately too busy with other things to give the time and attention necessary to successful operation of the new machinery. Because they failed to supply the personal zeal and that eternal vigilance which is necessary to the proper functioning of any machinery, the convention system proved subject to corruption and hardly more democratic than the caucus system. All too often control of conventions fell into the hands of political machines constructed and operated by unscrupulous bosses for the advantage of a self-appointed group. The "best people," frustrated in such sporadic efforts as they made to improve the operation of the system, tended to withdraw, often with an attitude of self righteousness, and let the self-appointed bosses select the candidates for office. In many cities linkage with liquor interests, gambling interests, and underworld groups of various kinds was indignantly portrayed to show the unfitness of politics as a subject for the attention of respectable people.

Although the degree to which the nominating convention was degraded varied from community to community, it was likely to be lowest in the large urban centers where there was least opportunity for widespread acquaintance among the people. The best known description of the personnel of such a convention is the following newspaper portrayal of a county convention held in Chicago in 1896.

> Of the delegates, those who have been on trial for murder numbered 17; sentenced to the penitentiary for murder or manslaughter and served sentence, 7; served terms in the penitentiary for burglary, 36; served terms in the penitentiary for picking pockets, 2; served term in the penitentiary for arson, 1; ex-Bridewell and jail-birds identified by detectives, 84; keepers of gambling houses, 7; keepers of houses of ill-fame, 2; convicted of mayhem, 3; ex-prize fighters, 11; pool-room proprietors, 2; saloon keepers, 265; lawyers, 14; physicians, 3; grain dealers, 2; political employees, 148; hatter, 1; stationer, 1; contractors, 4; grocer, 1; sign painter, 1; plumbers, 4; butcher, 1; druggist, 1; furniture supplies, 1; commission merchants, 2; ex-policemen, 15; dentist, 1; speculators, 2; justices of the peace, 3; ex-

constable, 1; farmers, 6; undertakers, 3; no occupations, 71. Total delegates 723.[1]

When disreputable interests won control of a convention, they kept their control by various devices such as calling meetings without sufficient notice to make attendance by their opponents possible, holding meetings in disreputable surroundings where respectable people were unwilling to appear, selecting convention officers of their own stamp, counting convention ballots to suit their own interests, and using thugs to dominate the situation if the opposition made trouble.

Political parties until the time of the Civil War and after were generally regarded as voluntary and private organizations with which government had little or nothing to do. Caucuses and conventions were therefore assumed to be outside the range of governmental regulation. Experience with the misuse of party machinery, however, gradually demonstrated the fact that some regulation of party machinery was necessary if the frustration of democracy in general elections was to be averted. By the end of the nineteenth century, at least twenty states had laws for the regulation of conventions [2] — or of primaries as they were sometimes called because, before winning office at a general election, a candidate had first to be selected at a convention. If civic groups all over the country had become aroused to the need of convention reform, it seems probable that the convention could have been revamped into an effective nominating agency. Before such a comprehensive change could take place, however, another type of reform was well under way. This was the development of the direct primary. Under this system party members began to vote directly for nominees, instead of merely electing or seeing party officers select members of conventions which would in turn nominate party candidates for office.

The Direct Primary. The direct primary, which is now commonly characterized merely as the primary election, has in most states become the principal method of selecting candidates for important state and local offices and for membership in Congress. In 1948, only two states — Connecticut and Delaware — held no primaries for national or state officials.[3] Another, Indiana, held primaries only for members of the House of Representatives, nominating United States senators and state officials by convention. In a few states, particularly in the South, resort to the direct primary is optional with the party. The Republican party, which is the minority party in the South, still makes extensive use of the convention device. The 1948 Republican primary in Virginia was the first ever held by the party in that state.[4]

1. Ralph M. Easley, "The Sine Qua Non of Caucus Reform," *Review of Reviews,* vol. 16 (September, 1897), pp. 322–23.
2. Ibid., p. 323.
3. "1948 Schedule for State Primary Elections," *Congressional Record,* January 30, 1948, vol. 94, part 9, p. A551.
4. See *Facts on File Yearbook, 1948,* p. 253.

So it is that as a nominating instrument the party convention remains in good standing for selection of presidential candidates, for selection of state and federal candidates in Connecticut and Delaware, for selection of United States senators and state officials in Indiana, and for the selection of candidates generally of one party in a number of southern states. Otherwise most of the nominating functions of the convention have been transferred to the direct primary. The convention remains an important party instrument for conducting campaigns, raising funds, getting out publicity, and performing a variety of other functions apart from the making of nominations.

The direct primary came into use as a nominating device to enable party members to participate in the process of choosing party candidates without contact with or frustration by corrupt party bosses. The many rules safeguarding the operations of primary elections are enacted by state legislatures and vary somewhat from state to state. The primary elections are held at times prescribed by state law with in general the same machinery as that later used for the general election in which the candidates of the respective parties compete with each other. Rival persons seeking nomination by the same party get their names on the ballot for the direct primary by filing petitions signed by prescribed numbers of qualified voters and by paying the necessary fees. The extent of variations in state practices is indicated by variations in the dates on which primary elections are held. In 1948 they were scattered over the calendar from the middle of April to the middle of September.[5]

Inter-Party Relations in Primaries. Since the direct primary was developed to take nominations out of the hands of ofttimes disreputable bosses and to make effective the will of as many of the people as possible, some states have gone further and adopted what is called the open primary. The open primary was an election for nominating purposes in which all people could participate who had a right to vote in the general election of the area in question, whatever their individual party affiliations. Democrats could vote in Republican primaries and Republicans in Democratic primaries. It was hoped that the quality of candidates would be improved by this widening of the party electorate. Experience demonstrated, unfortunately, that the visiting voters not only failed to raise the standard but at times voted deliberately to embarrass the party holding the election by casting ballots for undesirable candidates. The tendency, therefore, has been to resort to what is called the closed primary, wherein only those voters can participate who are registered members of the party. In some communities, non-partisan primaries are held for the nomination of candidates for local offices, but they have no significance as far as the election of federal officers is concerned.

For the purpose of enabling a popular candidate to demonstrate his real

5. "1948 Schedule for State Primary Elections," *Congressional Record,* January 30, 1948, vol. 94, part 9, p. A551.

strength with the people without reference to party alignments, California has experimented with a device called cross-filing. Through this device candidates seek the nomination of both parties for a given office at the same time. One of the incentives for the Republican nomination of Governor Earl Warren of California for the vice presidency in 1948 was the impressive popular vote which he had piled up for the governorship as the candidate of both major parties. Failure to secure the nomination of both parties as a result of cross-filing does not necessarily block the path to election. In 1948 Mrs. Helen Gahagan Douglas, a Democratic member of the House of Representatives from California, secured re-nomination by the Democratic party, lost the Republican nomination which she also sought, and was re-elected exclusively as the Democratic candidate.

In most of the states in which each political party faces strong opposition from the other, the person who receives the highest number of votes for an office in the primary election gets the nomination even though he may not have a majority of the total votes cast in the primary and may not have many more votes than some opposing candidate for the nomination. The rule is different, however, in a number of states in which, because of the weakness of the opposing party, nomination by the strongest party is virtually the equivalent of election. Nine southern states and Utah provide for a second or run-off primary if the person having the highest number of votes in the first primary has less than a majority of all the votes cast for the nomination he seeks. Thus in January, 1948, Earl K. Long won the largest number of votes for the governorship in a Louisiana Democratic primary but with substantial opposition from other candidates. In a run-off primary held in February he won over the highest opposing candidate. This victory was tantamount to election, and in April he was chosen governor without Republican opposition.[6]

The Direct Primary vs. the Convention. Now that the direct primary has pretty much crowded the convention out of the picture as a nominating instrument, the results of the change need to be appraised. Arriving at a judgment between the two kinds of nominating machinery is more difficult than the original sponsors of the direct primary expected it to be. It is inaccurate to compare the direct primary of today with the convention of the 1880's because the operations of primary elections in most states today are carefully prescribed by legislation, whereas the conventions of the earlier periods operated largely without benefit of such safeguards. The convention might never have become a thoroughly satisfactory nominating instrument, but it would have been greatly improved by state action — and by a great deal more of attention from responsible citizens. Adoption of the direct primary with surrounding safeguards did eliminate a considerable amount of corruption in the making of nominations, and it did widen citizen participation in the nominating process.

6. For discussion of primaries in terms of their varying importance, see C. A. M. Ewing, "Primaries as Real Elections," *Southwestern Political and Social Science Quarterly*, vol. 29 (March, 1949), pp. 295–98.

The direct primary did not, however, solve all the important problems. No political device, however carefully surrounded by legislative safeguards, can take the place of the eternal watchfulness which is necessary if political machinery is to operate as it should. After the novelty had worn off the direct primary, the people began to take it pretty much for granted just as they had taken the nominating convention. Abuses inevitably crept in, and the control of nomination passed more and more into the hands of minority groups which made a profession of political activity. These groups, in the innumerable differing communities throughout the country, were not and are not necessarily corrupt in all instances. It is probable indeed that gross corruption plays a very small part in the operation of nominating machinery. The fact remains, however, that groups which are by no means typical of the rank and file of the people take responsibility for getting the names of their chosen candidates before the people and make them well known, and for getting these names on primary election ballots. In all likelihood every community has among its people individuals who, if elected, would make better officers than those who get nominated. The difficulty is that neither these individuals nor their friends give the sustained attention to the matter which is necessary to getting candidates known and getting them elected. The difficulty is not that there is too much politics; politics is essential if anybody at all is to be elected. The difficulty, rather, is that there is not enough politics by the right people. The character of any game is largely determined by the people who play it. The game of politics and, more specifically, that of operating primary elections, is no exception.

Negro Voting in Party Primaries. In general, for persons willing to register as members of a political party, the qualifications for voting in primary elections have been the same as those for voting in general elections. The notable exception has been the attempts to exclude Negroes from party primaries in many southern states. The local reasons for widespread discrimination against Negroes in the exercise of political power in the South are at once too complicated and too well known to make it feasible to include here a broad discussion of the subject. Suffice it to say that, in spite of the extent to which the cultural and educational level of the Negro in the South has been raised since the time of his enslavement, large numbers of southern white people still view the mass of Negroes as inferior and inadequately disciplined. They believe that widespread participation in politics on the part of large numbers of politically unlettered people who might easily be swayed by the leadership of demagogues would be exceedingly dangerous. There are vast educational and cultural differences among Negroes, however, and some of them demand participation in politics as their right.

As far as general elections were concerned, the framers of the Fifteenth Amendment attempted to insure the political equality of Negroes by providing that "the right of citizens of the United States to vote shall not be

denied or abridged by the United States, or by any state on account of race, color, or previous condition of servitude." By means of intimidation and governmental maneuvers of various kinds, Negroes have been kept from participation in general elections in various sections of the South, but such discrimination was clearly unconstitutional and partly for that reason was widely condemned.

Discrimination in party primaries, however, where the choice of officers in many southern states is actually made, was long regarded as quite a different matter. Political parties were considered private rather than public organizations. If they were private, it was assumed that primary elections were not to be included among the elections in which the Fifteenth Amendment forbade racial discrimination and which Congress by another clause of the Constitution was authorized to regulate.

While holding that a state could not exclude Negroes from party primaries or authorize the parties to exclude them,[7] the Supreme Court for a time classified parties as private organizations which could limit their memberships and voting rights therein without any authorization from a state.[8] In 1941 the Court partly shifted its ground,[9] however, and in 1944 it classified the primaries of parties which were regulated by state law as elections which were subject to constitutional provisions about elections.[10]

So it is that in the light of recent decisions of the Supreme Court, primary elections as well as general elections are subject to regulation by Congress with respect to voting privileges and other matters, and racial discrimination by political parties which are regulated by the states violates the Constitution. A number of southern states remained unconvinced as to the desirability of letting Negroes vote in primaries whatever the Supreme Court might say on constitutional issues. The legislature of South Carolina repealed all its laws with respect to political parties and primary elections, hoping thereby to avoid the classification of the Democratic party of South Carolina as a state institution which was subject to the provisions of the Constitution. If it could be classified as a private organization such as a fraternity, it could then limit its own membership without reference to constitutional provisions. Nevertheless a federal district court in South Carolina held that primary elections in a state which in effect determined the course of the general election were state instruments and therefore subject to constitutional control. The judge remarked scathingly that "it is time for South Carolina to rejoin the union. It is time to fall in step with the other states, and to adopt the American way of conducting elections."[11] The decision was upheld by the United States Circuit Court of Appeals, and the Supreme Court of the United States refused to review it, thereby in effect giving its approval to the decision.[12] While some states continued their

7. *Nixon* v. *Herndon*, 273 U.S. 536 (1927) and *Nixon* v. *Condon*, 286 U.S. 73 (1932).
8. *Grovey* v. *Townsend*, 295 U.S. 45 (1935).
9. *United States* v. *Classic*, 313 U.S. 299 (1941).
10. *Smith* v. *Allwright*, 321 U.S. 649. See O. Douglas Weeks, "The White Primary, 1944–1948," *American Political Science Review*, vol. XLII (June, 1948) pp. 500–22.
11. *Elmore* v. *Rice*, 72 F. Supp. 516, 528 (1947).
12. *Rice* v. *Elmore*, 333 U.S. 875 (1948).

search for effective restrictive devices, Negroes participated in the 1948 primary elections in unprecedented numbers. They did so in part peaceably, but to the accompaniment of isolated reports of violence and intimidation.

NOMINATION OF FEDERAL LEGISLATORS

Electioneering Strategy. Although support of his local political organization is extremely important for a person seeking nomination to a congressional office, it is not always essential. A paragraph in the preceding chapter told how Estes Kefauver won the Democratic nomination for United States Senator in Tennessee in 1948 in the face of bitter opposition from the Crump machine. He did so in spite of great handicaps, however, and only through a great capacity to make new friends wherever he went and to utilize the new friendships in his support.

Candidates who have the backing of political machines or the support of ample funds from some source utilize advertisements, posters, handouts, and so on. In some areas, particularly farming areas spotted with small towns, they travel with sound-trucks and use local bands and other devices to stir up excitement for their public appearances.

In their contacts with the people, candidates vary tremendously in the extent and frankness of their discussion of public issues. Some adhere to the old fashioned type of oratory with which they denounce the opposition as a menace to the nation and promise if elected to bring peace and prosperity to the country and to gratify all local interests however much they may conflict one with another. Other candidates find it much more worthwhile to play down the formal speech-making and to talk individually with voters in various groups. Paul H. Douglas of Illinois, who in 1948 won the Democratic nomination for the United States Senate and was thereafter elected, has described his campaign in part as follows:

> My style of campaigning follows this pattern:
>
> I pull up my sound-equipped jeep wagon at a factory gate during a change in shifts, or on a village street, or somewhere else near the main flow of people. I introduce myself to whatever crowd gathers, and then summarize the main theses of the campaign. Afterward I move among the clusters of people to shake hands and to distribute campaign literature which they can read at leisure. In this way I've spoken to about 225,000 people and have shaken hands with over 100,000 of them.
>
> This, of course, is just one side of a day's work. A more detailed view can be grasped from my schedule upon a typical day in the city of Decatur, an industrial community of 70,000:
>
> 5:45 A.M. Rise and go to gates of a big machine shop where I speak to both the night and day shifts as they change.
>
> 7:30–9:00. Breakfast with labor leaders.
>
> 9:00–11:30. Drive fifty miles into the country and speak in three farming towns.
>
> 11:30–12. Speak at lunch hour to 500 foundry workers.
>
> 12–12:30 P.M. Speak in railroad shops to 300 employees.

1–2. Lunch with local leaders.

2:30–4. Speak at three factory gates to a total of 600 workers as they come from work.

4–8. Drive thirty miles to Taylorville, speaking twice on the way. Attend dinner of leading party workers, go to the county fair and shake hands with some 250 people and return to Decatur.

8:45–10. Change clothes and speak at meeting of Macon County Women's Democratic League and prepare abstract of speech for the local paper.

10–11. Talk with individuals or delegations who call.

11–12. Handle long-distance telephone calls about details of the next few days' work.

This activity was followed the next day by a 225-mile drive through four farming counties and eight towns, where I spoke to about 2,500 people and shook hands with over half of them. All this takes place day after day, long before the "formal" opening of the campaign.[13]

A very different type of campaign was that conducted by John P. Saylor, who was elected in Pennsylvania to fill an unexpired term in Congress. His account is relevant even though it has to do in large part with campaign activities which followed his nomination. Saylor refused altogether to participate in noisy rallies to stir popular excitement. Instead, he toured his district in his own car and got acquainted with his constituents. He won favor with elderly people by asking their advice. He talked to farmers about their problems. He went around among coal miners and made individual friends and "gassed" with steel workers. He was the kind of person who could get average people to "swap ideas" with him. He attended county fairs and kept on getting acquainted with people and making them feel as if he were a personal friend. Then, toward the close of the campaign, he made a few radio addresses stating firmly and simply his position on certain important issues. He fought his opponent by ignoring him.[14]

As already indicated, in some areas the major battles take place in the primaries, while in others they take place in the general elections. In most southern states the Democratic nomination is almost the equivalent of election. Republican nomination in that area on the other hand, which in most states comes from a convention if it comes at all, means that a hard and probably unsuccessful battle is still ahead. The Democratic office-seeker can afford to spend all his ammunition fighting a fellow Democrat. The Republican candidate has most of his trouble at the hands of the candidate of the opposing party. In certain states and congressional districts in the northern and western parts of the country the same thing is pretty much true except that the position of the parties is reversed. Maine and Vermont refused to go Democratic even in the overwhelming Democratic landslide of 1936. Various other regions are predominantly Republican and offer little hope for Democratic candidates.

13. Paul H. Douglas, "*Running* for Office Means What It Says," *New York Times Magazine*, September 5, 1948, pp. 5, 41.

14. See Lila H. Thompson, "Saylor Shunned Party Chiefs' Advice in Winning Congressional Seat," Baltimore *Evening Sun*, September 20, 1949.

PRESIDENTIAL AND VICE PRESIDENTIAL NOMINATIONS

Renominations. Obviously the best position from which to secure a party nomination for the presidency is the presidential office itself. A President who publicly and actively seeks renomination nearly always gets it. The most recent exception was that of Grover Cleveland, who in 1896 lost control of the Democratic party after offending labor in the Pullman strike situation and after aligning himself with the "hard money" minority of his party. Since he had already served two terms as President — although they were non-consecutive — his struggle for renomination had to run counter to the tradition that no President should serve more than two terms. The most recent failure to renominate a one-term President was the Republican nomination of James G. Blaine in place of Chester A. Arthur, in 1884. The situation there was confused by the fact that Arthur, who had become President as a result of the assassination of James A. Garfield, led a badly divided political party and was himself in poor health.

Any generalization about the inevitability of renomination, it is true, needs to be carefully guarded. William H. Taft won renomination in 1912 only at the expense of splitting his party and bringing about its defeat in the general election. Woodrow Wilson is said to have coveted renomination in 1920 in spite of the state of his health but refrained from public announcement because he, or his friends, had reason to believe that renomination was impossible. Some people believe that President Calvin Coolidge did not mean what he seemed to say when in 1927 he announced that "I do not choose to run for President in 1928." But it was generally assumed that he did mean what he said, and no serious attempt was made to draft him. Certain it is that the President in office, whoever he may be, has far greater prospect of renomination than a person in any other position. On two occasions Franklin D. Roosevelt was able even to surmount the opposition which arose from the conviction that two presidential terms are enough for any man, and, in the process, greatly to impair the force of that tradition. However, a constitutional amendment, proposed undoubtedly in part to prevent duplication of the Roosevelt achievement, now debars any President from serving more than two full terms.

The strategic value of the presidential position as far as nomination is concerned is determined by many factors. Even though a man may not be a distinguished President, his occupation of the office assures that his name will be widely known — and people tend to vote for names with which they are familiar. It is said that President Franklin Roosevelt on occasion deliberately refrained from mentioning the names of opponents in campaign speeches on the theory that many voters would not have heard of the opponent at the time and he was unwilling to give him free publicity.

The President, furthermore, stands at the head of his party, and the party in power must make its appeal on the basis of its record in office. If it rejects its leader it must appear also to repudiate its program, with the result that an excuse for retention of power will then be hard to find. Again,

a President with any skill at all will, through his control of patronage and in other ways, have built up strong vested interests among his fellow partisans. Large numbers of people in strategic positions owe their places to him, and their future security depends on his retention of office. They will insist on his renomination, even in the face of his own possible unwillingness to run. It is clear, for example, that large numbers of New Dealers insisted that Roosevelt run for a third and a fourth term because of the belief that their own security and that of the programs in which they had interest seemed to depend on his doing so. It is also true, of course, that the rank and file of professional politicians in his party supported him for renomination not from any interest in the New Deal but because they thought he might be the only candidate with whom they could win the election.

President Truman's experience in 1948 was similar to that of his predecessor. It was obvious that the large number of officials with whom Truman had replaced Roosevelt appointees, and particularly the Truman appointees from his own state of Missouri, were intent on the renomination of the President because their fate depended on his political survival. True, President Truman had severe opposition within the ranks of his own party. Two groups among them engaged in what a prominent newspaperman called "an attempt to blackjack a President into a public abdication of his office."[15] The two groups were southerners enraged by President Truman's civil rights proposals and a liberal group which contended that the Truman administration had scuttled the liberal program of the New Deal.[16]

Pre-Convention Publicity. Presidential and vice presidential candidates are formally nominated not by primary elections, as are most United States senators and representatives, but by national convention of party delegates which meet in the summer, usually in June or July, of each election year. However, candidates for nomination cannot afford to limit their pre-convention political activities merely to currying favor with the people who will be delegates to these conventions. Much as they may like a particular candidate, delegates cannot be expected to vote for him unless they have assurance that he can win votes in the general election which will follow. Every candidate, therefore, must work to enlarge his popular following. The President in office has no difficulty in keeping his name before the public. The same is true to a lesser extent of a United States senator or a governor of a large state. A governor may have to make a special effort to get national attention but he has an advantage over the United States senator in that the latter, in the course of his duties, may have to commit himself publicly on national issues in such a way as to make enemies as well as friends. Prior to the 1948 Republican convention, for example, Governor Dewey of New York was able to avoid difficult political questions, whereas Senator Taft stirred opposition by his leadership on behalf of the Taft-Hartley measure for restricting the powers of labor unions.

15. Frank R. Kent, "The Great Game of Politics," Baltimore *Sun*, May 30, 1948.
16. That is, the Dixiecrats and the Wallace Progressives.

A candidate for presidential nomination is handicapped if he has no official position to give him publicity. After nomination as the Republican candidate in 1940, and after defeat at the general election, Wendell Willkie tried to keep himself politically alive for renomination in 1944 by making a world tour and writing a book about *One World.* His declining health and his inability to get along with professional politicians made adequate appraisal of the results impossible. In the same interim period, and with an eye on the same campaign, Harold Stassen published a book discussing in somewhat vague language his position on public issues. He resorted to the doubtful expedient of announcing his candidacy as early as 1946, but he failed to win a following strong enough to compete effectively with Governor Dewey. Stassen's more successful political efforts probably included embarrassing disclosures which he made before congressional committees and elsewhere of financial speculation by members of the Truman administration made possible by inside knowledge gained as government officials.

The Presidential Primary. Although no political party ever seriously considered abandoning presidential nomination by national convention and substitution of the direct primary, roughly fourteen states, which elect close to half the delegates, resort to what is called the presidential primary for the election of convention delegates. Apart from the election of delegates, the presidential primary is a device for polling sentiment concerning the candidates for presidential nomination who get their names on ballots in states or districts where presidential primaries are held. These primaries differ greatly from state to state. They vary as to the cost of filing and the number of signatures required on filing petitions. In some presidential primaries, delegates to the national convention are bound to vote for the presidential candidate polling most votes in the state, but only until varying points in the proceedings when it appears that the preferred candidate has no chance of election. In some states the primary has no limiting effect on the freedom of the delegate.

In general, a candidate makes up his own mind whether or not he will submit his name in the primaries of those states which have them. If he can win he will gain valuable publicity. If there is a possibility of defeat by a favorite son of the state or by an outsider, it may be better to refrain from entering the primary. In 1948 Harold Stassen violated a tradition against entering the field of a strong favorite son when he filed his candidacy in Ohio. He did so only in selected districts where he had strong expectations of winning. He lost, however, in terms of the totals of the votes cast in the districts in which his name was filed, thereby demonstrating the doubtful value of his strategy. For the country as a whole, however, he picked his primary election battlegrounds well enough to be able to show total votes in excess of those received by either Dewey or Taft.

In the main, however, the presidential primary is not generally regarded as a particularly useful device for registering the popular will concerning presidential nominations. Some device must, of course, be used to select the

delegates to the convention, and the primary is acceptable for that purpose. Where presidential preferences are registered, however, either by giving binding instructions to delegates or otherwise, those instructions must often be given before the people have had time to make up their minds about the qualifications of the respective candidates. There is a tendency, furthermore, to support favorite sons, turning the delegates loose to exercise their discretion only after it has been demonstrated that the favorite candidate has no chance. The public has no real interest in the delegates apart from their votes in the convention. The delegates are usually chosen from among the party faithful and may not have any wide acquaintance among the people. There may be point, therefore, in the widespread practice of selecting delegates, not through party primaries but through conventions, which are themselves made up of professional party politicians. Yet if this is true, it stands as an admission of the failure of democracy in this important area. While a popular vote will eventually determine that the presidency will go to the candidate of one party or the other, the people have very little choosing to do if they are unable to share in the decision as to who the two candidates are to be.

Except as presidential primaries reflect the will of the people, the delegates to national conventions are chosen largely by professional politicians. Although the political profession is indispensable in our society, its indispensability does not confer upon it the right of dictatorship. It has been said that war is too important to be left to the generals. It is also true that politics at certain critical points — and the nomination of presidential candidates is one of them — is too important to be left exclusively to the politicians. Politicians, like the military, should be used for the political knowledge and skills they possess, but we should not be used by the politicians. Our political machinery will remain grossly defective until we achieve greater popular participation in the earlier stages of nominating presidential candidates.

The National Convention. The national committee of each major party, consisting of two delegates from each state and territory, holds a meeting in Washington early in each presidential election year. It decides on a meeting place for the national convention in mid-summer, making its selection from among the larger cities of the country with Chicago and Philadelphia among the places most frequently chosen. The committee authorizes the selection of delegates to the convention, and the executive committee and the chairman who heads it begin the planning of election strategy.

Allocation of delegates to each national convention was formerly based on the representation of the various states in the United States Senate and House of Representatives. The total membership was twice the total of 531 members of Congress. Under this arrangement the representation of a state was determined by the total of its population and not by the strength of the party therein. Northern Republicans long complained that this arrangement gave too much influence to delegates from southern states wherein

the Republican party had no hope of carrying the election. First the Republican party, and then the Democratic, developed machinery for cutting down the allocation of delegates to areas wherein the opposition remained in control and giving bonus votes to areas in which elections were won. The result is a much fairer distribution of delegates and some change in the total number of delegates and of convention votes which may be cast. The number in the Republican convention of 1948 was 1,094, whereas that in the Democratic convention was 1,234. In order to take care of additional politicians who want a trip to the convention city, a state may send alternate delegates as well, and it may split its convention votes in half and send a delegate for the voting of each half.

Some of the state delegations are bound by instructions to vote for particular candidates. Some are bound to cast the votes of their respective states as units. Large numbers of other delegates are committed individually or as groups to vote for favorite sons or other candidates. Control, therefore, tends to centralize in those men who wield the votes of the several delegations. The individual voter tends to become something of an automaton, useful only for voting when and as he is told. Edward J. Flynn estimates that there are considerably less than one hundred men in each convention who direct the proceedings. When they are not needed on the floor, the rank and file of delegates make use of the social occasion much as does a convention of Elks, or the American Legion, of any other group of convivial people on a pleasure escapade.

Among the hundreds of delegates coming into the convention city, now flag-bedecked for the occasion, there is unanimity of sentiment on only one point — the party must elect its candidate at the ensuing general election. Complete unanimity, indeed, may be lacking even here. Some individuals and groups may be prepared to abandon the party unless their favorite candidate is nominated, as did the Theodore Roosevelt Progressives in 1912 and the Democratic Dixiecrats in 1948. Some may give up all interest in the campaign if their candidate is not nominated, or if a badly hated candidate is chosen, as did some Democrats in 1936. By and large, however, the politicians who rise to such power as to influence a national convention have been well schooled in subordinating their own interests to those of the party. They will support the nominee with an appearance of enthusiasm, however much they may dislike him and however much they may have resented his nomination.

Unanimity, however, or the appearance of it, comes only at the end and usually after heavy battles have been fought — unless the task of the convention is to nominate a President already in office — and after much work of pacification has been done. Initial proceedings usually reflect the strategy of often bitter factional struggles. The leading politicians in the convention do not assemble merely for the purpose of supporting whatever candidate shall receive the nomination. Each of them is interested in the nomination of a particular candidate. He is concerned not only with a victory for the party but also with victory through a particular candidate, whose success

is expected to bring fairly tangible rewards to the politicians who helped to bring it about. The victor, in other words, will consult with his leading political aides about appointments to be made, and perhaps even about governmental administration.

Obviously, not every leading politician in the convention can bring about the nomination of his favorite candidate. He does, however, have an article of value for disposal, namely, the bloc of votes which he controls. Other candidates must have the votes of his followers, or of the followers of someone like him, if they are to have a chance at success. At times a bloc of votes may be traded in return for support for the vice-presidency, or for a cabinet position, or for advocacy or opposition to some particular measure, such as a bill to aid agriculture or labor. The skillful political trader seeks to sell what he has only after he finds that he cannot win for his own candidate and at the time when his votes are so badly needed that the maximum price will be paid for them. He knows that if he holds out too long, deals will be made among other groups with such success that his votes may not be needed at all. His one-time valuable product will then have lost all its value. The political game, therefore, must be played with great skill, and proper timing is essential to its success.

Organization of the Convention. The supporters of leading candidates set up headquarters in hotels in the convention city. Decorations, flags, banners, and ballyhoo of all sorts are used to call attention to particular candidates, and optimistic predictions are made as to the number of votes to be polled and the probability of early victory. In the meantime the process of organizing the convention gets under way. Proceedings are in the hands of the national committee of the party, which nominates a temporary chairman and other officers. Selection of the temporary chairman is a matter of great importance, for it is he who delivers the keynote address of the convention. In that address he lauds the record of his party, praises its past heroes, and denounces the record and perhaps the leadership of the opposing party. Skillfully avoiding rifts and feuds within his own party, he seeks to promote its unity, predicting overwhelming victory for the candidate yet to be nominated.

Each powerful faction in the convention therefore seeks to determine the selection of a keynoter favorable to its candidate. The election of a temporary chairman, indeed, is likely to offer the first important evidence of the relative strength of contending factions in the convention.

Important committees composed of one member from each state and territorial delegation prepare for the work of the convention. They have jurisdiction over rules and order of business, credentials, permanent organization, and platform and resolutions. The rules submitted for adoption approximate those of the House of Representatives. The matter is usually not one of great controversy. The subject of credentials, on the other hand, may be highly controversial. In the selection of delegates factional struggles take place in many states between the followers of different presidential

candidates. The situation is often confused, and two or more delegations may appear from one state, each claiming to be the legitimate choice of the party. The action of the Committee on Credentials in seating one delegation or another may greatly help or hinder a presidential candidate in his attempt to line up the votes necessary for nomination. The decisions of the Committee on Credentials are usually accepted by the convention, but there is always the possibility that the losing candidate may have enough votes on the floor of the convention to overrule the committee and bring about the seating of another delegation.

The work of the Committee on Permanent Organization is also important in that the officers chosen, and particularly the permanent chairman, may in the course of making decisions give advantage to one candidate or another. The chairman should be a man of strong and decisive personality, and should be a skilled parliamentarian. Before the days of radio amplification, he, like the temporary chairman, needed also to be a man with a foghorn voice. With the aid of modern equipment, he can now get along without that particular accessory.

While the machinery of organization is being established the Committee on Platform and Resolutions is engaged in the preparation of a usually flamboyant platform document telling in broad language what the party stands for and what it condemns in the operation of the national government. It must create the impression of firm opposition to the other major party without giving offense to any section of the country, or to any interest which controls voting strength where its use may be decisive in the elections.

The phrasing of the platform is not likely to have any important effect upon the election of the party's nominee, but its phrasing might indicate the strength or weakness of particular candidates; because in general it promises all things to all men without any theory or expectation of fulfillment in detail, the platform is not taken too seriously. The utterances of the candidate who is eventually nominated, vague though they may be in important respects, are likely to be more specific and much more indicative of the program to be carried out by the candidate if he is elected than is the platform adopted by the convention.

Nominations for the Presidency. When the convention has been organized, the rules adopted, the personnel determined, and the platform approved, the roll of the states is called in alphabetical order for submission of the names of presidential candidates. A state whose name comes early on the list may have no candidate of its own. In that event, by an arrangement previously made, it may defer to New York or Ohio, Minnesota or Missouri, or some other state, thereby giving the friends of some powerful candidate the opportunity to get his name in nomination at the earliest possible moment. For the state which has the floor, a speaker chosen both for his political prestige and for his oratorical powers delivers an address which rises slowly to a powerful climax and at the strategic moment men-

tions the name of the candidate to be placed in nomination. At this point, comes a terrific uproar, part of it no doubt spontaneous but most of it carefully engineered, with riotous delegations parading tumultuously through the auditorium to the accompaniment of every noise-making device available. Leaders see to it that the tumult does not subside too soon and thus avoid giving the impression of only limited enthusiasm.

Other candidates are nominated in similar fashion. When all the nominating speeches have been delivered, still more speeches are delivered seconding the nominations already made. When these speeches are over the convention is ready to vote.

Once again, the alphabetical roll of the states is called. At the call of the name of his state, the chairman of each delegation announces the alignment of his delegation. Depending upon the roles for which the delegates were selected, they may vote solidly for a particular candidate or they may divide among two or more candidates. Some member of the delegation may question the count of its votes as made by the chairman. In that event, passing on to other states is delayed while the delegation is publicly polled. Polling of delegations, particularly of very large ones, is a slow and monotonous performance. Calling the roll of the states, therefore, may be a matter of hours, during which the several chairmen find it necessary to keep their restless delegations together for all eventualities.

It is, of course, the hope of every candidate that he will be nominated on the first ballot. That usually happens when the President in office is being renominated, and it sometimes happens with new candidates. As a rule, however, nominations which do not involve the President in office require more than one ballot, and sometimes a great many of them. Delegates from some states are usually instructed to vote on one or more ballots for a favorite son, and some may do so relentlessly until the end. More probably, however, the time will come when the initially favored candidate or the chairman of the delegation will release the delegates from their original obligations and attempt to turn the vote of the state over to some more powerful figure. Perhaps the most skillful political maneuvering done in the convention is that whereby the spokesmen for strong candidates persuade the delegations of scattered minor candidates to line up with them.

The leading candidate on the early ballots is by no means assured of victory. Some show their greatest strength at the very beginning and are unable thereafter to draw other blocs of voters to them. If in the meantime some originally weak candidate begins to accumulate voting strength, the initial support of the candidates who first take the lead may begin a slow decline and then disappear at an increasingly rapid rate. In the 1940 Republican National Convention, for example, both Taft and Dewey started out with more votes than Willkie, who was eventually nominated. Determination to prevent the nomination of particular candidates may force the ultimate selection of a "dark horse," some relatively unknown person, as, for example, when in 1924 on the forty-fourth ballot, the Democrats nominated John W. Davis.

Experienced convention politicians are sensitive to all such possibilities. As early as February, 1920, for example, Harry Daugherty, who was working for the nomination of Warren G. Harding by the Republican National Convention of the following summer, made this astonishingly accurate prediction:

> I don't expect Senator Harding to be nominated on the first, second or third ballot, but I think we can afford to wait to take chances that, about 11 minutes after 2, Friday morning of the convention, when 10 or 20 weary men are sitting around a table, someone will say, 'Whom will we nominate?' At that decisive time the friends of Harding will suggest him and can well afford to abide by the results.[17]

The prediction was approximately fulfilled except that the day was Saturday instead of Friday.

Eventually, even in the most long drawn out sessions, negotiations bring about the shifting of enough votes to a single candidate to give him a majority of the total and to bring about his nomination.[18] Thereafter every effort is made to create an appearance of unanimous enthusiasm for the candidate. Although until the time of his nomination custom requires that the candidate shall remain at a distance from the convention hall, if not indeed from the convention city, he is likely to keep himself in readiness for a speedy appearance on the convention platform immediately after his nomination to receive the ovation of the assembled multitude. In 1948 Governor Dewey rushed from his Philadelphia hotel to the Republican convention hall. President Truman, completely assured of his renomination by the Democratic National Convention, arrived in Philadelphia with his family and waited for hours just outside the nominating hall so that he could make his appearance before the convention and deliver his acceptance address.

Nominations for the Vice Presidency. Although the primary business of the national convention is nomination of a presidential candidate, a candidate for the vice presidency also must be chosen. The presidential nominee usually has an influential and perhaps a controlling voice in the selection of his running mate for the campaign. Cooperation during the campaign, indeed, is probably thought of at the time as more important than the matter of subsequent cooperation between the President and the Vice President if the election is won.

In choosing the vice presidential nominee, it is important to remember that some of the disappointed seekers after the presidential nomination have substantial followings and that the enthusiasm of their support in the coming campaign may be influenced by the consideration given to them. Even in the face of the prospect that a presidential aspirant may refuse to accept this relatively obscure position on the ticket, it may be good strategy

17. Thomas L. Stokes, "What Goes on in the 'Smoke-Filled Room'," *New York Times Magazine*, June 20, 1948, p. 42.

18. For more than a century the Democratic party required a two-thirds vote for nomination. That requirement was abandoned in 1936.

to offer him the opportunity. Other considerations may also be important. It is usually desirable that the candidates shall not only come from different states, as the Constitution requires, but also that they shall come from different sections of the country and that, if possible, they shall seem also to represent somewhat different interests and points of view — although the difference on points of view must not be too great and must not be exposed so fully as to cause embarrassment during the campaign.

When a national convention renominates the President in office, its principal creative task may be the selection of a vice presidential candidate. This is particularly true when, as in 1944 upon the renomination of President Roosevelt, party leaders have reason to suspect that in selecting a vice presidential candidate they will be selecting a President for most of the ensuing four years. It is clear that in 1944 President Roosevelt played behind the scenes a substantial part in the nomination of Harry Truman, but even so a great deal of discussion and maneuvering took place among the several political leaders at the convention.[19] The behind-the-scenes controversy was intense and defeated aspirants were bitter in their disappointment.

Since the Vice President may have to assume the burdens of the presidency, he ought to have the youth and vigor necessary for handling such burdens. Evidently it was partly with this fact in mind that President Truman in 1948 asked Supreme Court Justice William O. Douglas to be his running mate. When Justice Douglas declined, the convention nominated United States Senator Alben W. Barkley, a distinguished politician but a man seventy years of age. Because of this incongruous choice, some commentators leaped to the conclusion that the convention did not expect the party ticket to win and was merely making a gesture in recognition of Senator Barkley's services to the party.

Appraisal of National Conventions. A newspaper observer of the Democratic and Republican National Conventions of 1948, Anne O'Hare McCormick, offered the following comparison:

> The setting, the music, the script and the pattern were so much alike that a spectator falling asleep in the Republican convention and waking up in the Democratic could not tell the difference. There was the same tropical atmosphere, the same effect of static in the stale political oratory that nobody listened to, the same restless shuffling among the delegates, the same thumping and whistling and parades of cardboard faces. The Republicans were more complacent and less contentious, at least on the floor. The Democrats arrived in the slough of despond, but in the melting pot of contact and friction they worked themselves up at the end into a mood as cocky as that of their rivals.
>
> The delegates looked alike, as they do at all American conventions. There were more foreign accents, more Southern accents (perhaps for the last time) among the Democrats. Apart from the South, they were predominantly a city crowd. The Republicans were more upstate, Middle West, small-town.

19. See Flynn, *op. cit.*, Chapter 14.

> Women were more prominent among the Democrats and youth among the Republicans. But each gathering was a mixture of all the strains, sections, classes and shades of opinion that make both parties typical of the fluid society of the United States.[20]

Mrs. McCormick explained the similarity of the two conventions by the fact that neither brought together representatives of a single party but rather aggregations of representatives from diverse groups which were parties in themselves even though they might all bear a common label. Sharp deviations from normal convention personnel and behavior are to be found only in the minority conventions, which to some extent represent groups with unified aims and aspirations and occasionally with the characteristics of particular regions. Characteristics of uniqueness in appearance, accent, and aim were apparent in the convention of the "Dixiecrats," Democrats who opposed the Truman nomination, which met in Houston, Texas, and nominated Governor J. Strom Thurmond of South Carolina. Even more distinctive was the aggregation of liberals, pro-Communists, and dissenters generally who met in Philadelphia under the label of the Progressive party to nominate Henry Wallace. One of the unusual features of this group was said to be scarcity of that element which in politics "is supplied by professionals who know how states are carried and often have carried them in their own names or as the chiefs of party organizations." [21]

National Conventions as Representative Agencies. Yet a national convention is at the very best anything but fully representative of the people. The lack of popular participation or the lack of considered popular judgment in the selection of delegates was noted above. We have also noted the estimate that convention proceedings were likely to be determined by less than 100 of the 1,000 to 1,300 delegates. Within that group, in the event of intense competition among a few contenders for the nomination, a very much smaller group of skillful strategists may determine the outcome. Decisions of major importance are likely to be made behind closed doors rather than in the riot of activity which takes place in the convention hall.

Attempts are made to keep the people thoroughly informed of public proceedings in the conventions through newspapers, radio, and television. According to a poll of representative voters made by the American Institute of Public Opinion, twenty per cent of them read most of the news about the Republican National Convention of 1948, forty-four percent did some reading, and thirty-six percent none at all. The radio figures showed that twenty-four percent listened to most of the convention broadcasts, fifty percent to part of them, and twenty-six percent to none at all. Only four percent saw any part of the program on television.[22] All in all, the conventions are a poor means of holding public attention, for they cover too

20. Anne O'Hare McCormick, "The Big Paradox of the Party Conventions," *New York Times*, July 17, 1948.
21. Arthur Krock, "A Sustaining Element Missing at Philadelphia," *New York Times*, July 27, 1948.
22. *Washington Post*, July 10, 1948.

long a period, the confusion is too great, there is too much appearance of wasted time, the speeches are too long and too lacking in content, and there is too little evidence of serious concern about the public welfare. Readers, radio listeners, and people watching by television have little sense of the convention as an instrument whereby they, the American people, are deciding how and by whom they are to be governed.

It is not widely contended that bad management of conventions or their lack of representativeness frustrates the desires of the American people for the nomination of some particular candidate whom the politicians are unwilling to accept. George Gallup, director of the American Institute of Public Opinion, has stated that, beginning in 1936, Republican opinion has shown majority support for the candidates nominated by the Republican party at the time of the nomination rather than for persons not nominated.[23] Whatever the limitations of public opinion polls,[24] there is little reason for doubting the generalization Gallup drew from this one. It is likewise true that apart from splinter parties representing definite minorities, no substantial public following had developed for any Democratic opponent of President Truman in 1948. Even so, there was an unmeasured amount of anguish on the part of voters in both parties who disliked or distrusted all the leading candidates. None of the parties in their 1948 conventions nominated a candidate who was genuinely popular. Comments among voters indicated dislike or distrust of Dewey, belief that Truman was too small for the position of national leadership, disillusionment with Wallace, resentment at Thurmond for splitting his party on a local issue, and a sense of futility in voting for Norman Thomas.

This is not to say that a national convention has no interest in popular reactions to its candidates. It must compete in the matter of popularity at least to the extent of choosing a man who is less unpopular than the candidate of the opposing party. When the general level of popularity is low, however, the challenge of competition is feeble. The national convention likewise feels little concern about the shaping of public issues — as witness the content of most national platforms. Its organization and personnel are adapted to the selection of candidates but not to the shaping of public policy. The inability of the convention to act on public issues derives in part from the fact that the party as a whole and the delegates who come to the convention as its representatives are divided in all directions. There is not, and perhaps cannot be, anything approaching unanimity on important and live public questions. Another reason, however, is the makeup of the convention itself. The membership of the convention consists predominantly of people who operate political machinery at the lower levels and think in terms of lower level operations, and who are concerned primarily with the maneuvering necessary to individual advancement rather than with important questions of policy. Such people tend to build up the candidacies of men of their own kind, men who are concerned with personal

23. *Washington Post*, June 30, 1948.
24. For discussion see the following chapter.

politics rather than with public welfare. This is not said by way of an attack upon professional politicians as such. They are, as has already been said, essential to the smooth operation of any society. The point is that, like the members of any other profession, they must be kept in their places and must not be permitted to become the unchosen rulers of our society. Party machinery which is genuinely representative must find some way of getting past the personally minded and locally minded professional politician to the enlightened weighing of public issues in terms of which national officers ought to be selected. Unless and until parties find some way of dealing with public issues and of making decisions on issues as the people want them made, it is either futile or dangerous to advocate increase of the power of the political party within the machinery of our government.

The aggregate of our nominating machinery, indeed, whether it has to do with the nomination of presidential candidates or of candidates for positions in Congress or for state offices, operates but crudely at best. It may be that in some instances completely new types of mechanism ought to be devised. The basic need, however, is for deeper and more sustained attention on the part of the electorate. Without such attention, no machinery, however adequate theoretically, will operate to promote the public welfare.

References

Spencer D. Albright, *Ballot Analysis and Ballot Changes Since 1930* (Council of State Governments, 1940).

———, *The American Ballot* (American Council on Public Affairs, 1942).

A. N. Christensen and E. M. Kirkpatrick, *Running the Country: An Anthology of American Politics in Action* (Holt, 1946).

Theodore W. Cousens, *Politics and Political Organization in America* (Macmillan, 1942).

James A. Farley, *Behind the Ballots: The Personal History of a Politician* (Harcourt Brace, 1939).

———, *Jim Farley's Story* (Whittlesey House, 1948).

Edward J. Flynn, *You're The Boss* (Viking Press, 1947).

Alexander Heard and Donald S. Strong, *Southern Primaries and Elections 1920–1949* (University of Alabama Press, 1950).

Matthew Josephson, *The President Makers* (Harcourt, Brace, 1940).

Arthur S. Link, *Wilson; The Road to the White House* (Princeton University Press, 1947).

Boyd A. Martin, *The Direct Primary in Idaho* (Stanford University Press, 1947).

Henry L. Mencken, *Making a President* (Knopf, 1932).

Charles E. Merriam and Harold F. Gosnell, *The American Party System* (Macmillan, 4th ed., 1949).

Charles Michelson, *The Ghost Talks* (Putnam's, 1944).

Warren Moscow, *Politics in the Empire State* (Knopf, 1948).

Louise Overacker, *The Presidential Primary* (Macmillan, 1926).

James K. Pollack, *The Direct Primary in Michigan* (University of Michigan Press, 1943).

Henry L. Stoddard, *Presidential Sweepstakes; The Story of Political Conventions and Campaigns* (Putnam's, 1948).

8

General Elections

Struggles over the nomination of party candidates represent as a rule but internal skirmishes within political parties, skirmishes which precede the grand contests between candidates of opposing parties in what are called the general elections. With the making of nominations the die has been cast, and apart from usually abortive resort to minor party candidacies, it is now too late to consider the merits of other would-be government officials than the nominees of the major parties. The battle between the major parties will go on, largely uninterrupted by the fringes of dissent. The result of the election for each candidate must be in terms of an absolute. There can be no compromise. The outcome of this struggle cannot be a draw, as it can be when issues rather than candidates are concerned. The nominee will be elected to office or he will go down to defeat. Within the rules of the game or the rules of political warfare, the candidate can expect no quarter from his adversary.

General elections have always been important phenomena in American life. Linking national, state, and local contests as they often do, and calling up latent rivalries between the traditional adherents of the major political parties, they charge the people with the excitement of mass rivalry and at the same time infuse them with a sense of common purpose. They provide an outlet for feelings of resentment against past governmental conduct — and sometimes against the miseries of war and depression and other human misfortunes as well — and they provide opportunity to indicate political preferences for the future. Political meetings held for electioneering purposes, particularly in rural and semi-rural areas, have traditionally been picnic or Chatauqua-like performances at which oratorical harangues, brass bands, and fife and drum corps have stirred to fever pitch the emotions of mixed crowds and relaxed the restraints of habitual individual and community discipline. Electioneering methods have differed only in degree in urban areas, where blaring sound-trucks proclaiming the merits of parties and candidates add nowadays to the total din. Radio and, to a lesser extent, television seek voter attention within the home. So stirring may be the climax on election day, and so imminent the threat of emotions transformed into violence, that gatherings within the immediate

vicinity of the polls are forbidden and in most communities the sale of liquor, which might shift the delicate balance from peace to disorder, is generally prohibited throughout the day. The electoral process, in short, partakes of the character both of warfare and of sport, and provides a kind of emotional catharsis for the participating community.

The excitement which attends the elective process and the emphasis generally given to the victory or defeat of particular candidates sometimes obscure the deeper significance of the process as a whole. In spite of the extravagance with which most candidates and their supporters flaunt their claims to office, the extravagant promises for the future, and the intensity of attack upon political enemies, campaigns give some evidence of what candidates stand for and thereby give the people some opportunity to participate in the shaping of governing policy. In casting their ballots, voters in some measure indicate how they wish to be governed as well as by whom. In state and local elections, as distinguished from those having to do only with the federal government, the electorate may be asked to express itself on individual ordinances, laws, and constitutional amendments as well as on the selection of officers. Apart from voting directly on such measures, the people tend to support the parties and the candidates who promise what the people most want. So it is that election results tend in a rough fashion to express what is sometimes called the popular will concerning the operations of government. Through the sifting process, which begins when individual voters first think of men and measures most pleasing to themselves and ends with the casting of majority votes for particular candidates, the partly conflicting and partly harmonious desires of the voters work themselves into a pattern acceptable to the majority of participating citizens.

Although in theory elections precede the exercise of governmental power and are therefore antecedent to rather than part of government, their relation to government is so vital that they have in every phase significant implications for government itself. They need, therefore, to be discussed at greater length in terms of the struggles for power and influence which they represent, of the significance and the relations of small and large areas in political contests, of the strategy of campaigning, of the influence of groups which may be technically non-political, and of the inevitable problems of finance.

ELECTORAL AREAS

Significance of Size. The dimensions of the areas in which candidates are elected to office vary all the way from urban wards and precincts in which local municipal officers are chosen to the continental United States in its entirety. The size of the area measures in part the amount of power to be exercised through political office, the compensation to be received, and in general the calibre of the man likely to be elected. This does not, of course, mean that all offices or areas having the same name necessarily approximate one another. The mayor of New York City may exercise more

power and receive more income than the governor of Nevada. The smaller the electoral area, the more intensely local is the jurisdiction to be exercised by the officer. The larger the area, on the other hand, the more inevitable it becomes that the candidate think in terms of problems broad in territorial range, and that he divorce himself to some extent from peculiar localisms. No candidate for the presidency, and perhaps not even a candidate for the governorship of Ohio, will concern himself extensively with problems of traffic congestion in downtown Cincinnati. Local candidates, in turn, are not likely to give much attention to problems of national defense or to over-all problems of the conservation of natural resources. Yet national, state, and local problems interact one upon another, and with the interaction of problems goes interaction in electioneering and in election results. The impact of local elections upon state and national elections is peculiarly great because of the grass roots character of much of our effective political party organization. Much of the strength of our major political parties is derived from precinct and ward organizations and the regimes of local party leaders and party bosses who keep their people aware of politics and marshal voters to the polls. Exercising such leadership, and thinking inevitably very much in terms of local problems and local politics, they give local color to elections even when state and national issues are at stake.

Election of Federal Officers. The enormous amount of electoral activity which has to do with the selection of state and local officers is beyond the scope of this study except as it affects and is affected by elections of national officers. In terms of the size and population of the United States, the number of national officers elected is extremely small. Out of well over 2,000,000 federal employees, the only ones elected are 435 representatives, 96 senators, and a President and a Vice President. They include, therefore, only the top officers of the executive branch and none at all in the federal judiciary. So brief indeed is the list of federal officers chosen by election by contrast with the much longer lists for state and local governments, and so great is the power exercised by the federal government, that ardent believers in democracy at the polls may well question the extent of democracy of the United States as it operates through the federal government, and may meditate upon the contention frequently offered in recent years that the government of the United States was not established as a democracy at all but only as a republic with a limited amount of popular representation. However that may be, the fact that so few federal officers are chosen by ballot is important in terms of the interaction of electoral processes in large and small electoral areas.

Congressional Districts. Four hundred and thirty-five of the five hundred and thirty-three elected federal officers are members of the House of Representatives. The representatives, one from each congressional district, are elected from the total area of the forty-eight states with each state

having at least one representative. Four states, Delaware, Nevada, Vermont, and Wyoming, have only one representative each. New York, the state with the largest population, has forty-five representatives, and Pennsylvania, next in size, has thirty-three. The other states have numbers of representatives varying with their populations. The total number of representatives was fixed at 435 not by the Constitution but by Congress after the number had increased from an original of sixty-five as a result of periodic reapportionments. Although the balance of representation was changed from time to time as new states were added to the Union and as state populations increased, the task of reapportionment was relatively easy as long as it could be handled by adding to the total number of representatives. Additions to membership so enlarged the House of Representatives, however, that it became unwieldy as a deliberative body. It therefore became necessary to freeze the total at 435 which was the figure arrived at in 1910.

When it was no longer possible to readjust representation by adding to the total of representatives, the task of readjustment became politically much more difficult. If one state increases greatly in population while another stands still or perhaps declines, just reapportionment may require that the representatives allocated to the second state be reduced in number in order to give representation to the increased population of the other. Taking representation away from a state, however, is pretty sure to cause political resentment and resistance, however justifiable it may be. So great has been the resistance of loser states that after fixing the total of representation, Congress found it next to impossible to overcome the resistance and enact reapportionment measures. Finally, in 1929, Congress enacted a measure providing that in the event of the failure of Congress to enact a new apportionment measure after each decennial census, reapportionment should take place in terms of new population totals according to a highly complicated mathematical procedure.

Political pressures operate not only on the allocation of representatives to the several states but also on the establishment of boundaries of congressional districts within the states by the state legislatures. Alhough Congress could if it chose interfere with the establishment of these districts, it keeps hands off, for political reasons similar to those which make it reluctant to shift representatives from one state to another. The definition of districts is therefore left largely in the hands of the states. In various states, legislatures have from time to time "gerrymandered" congressional districts to promote the interests of the party in power. That is, they have drawn district lines in irregular fashion so as to isolate as much as possible substantial groups of the opposing party in a few districts in order that the major party might dominate the largest number of remaining districts and elect the largest possible number of representatives.

Perhaps more serious than active gerrymandering is the failure of legislatures to readjust the lines of congressional districts to take into account changes in population within the states. Recent decades have seen a vast shifting of population to urban areas. Yet congressional district lines often

remain unchanged, with the result that urban populations are under-represented in Congress by contrast with rural areas. As of 1946 the disparity between urban and rural representation was best illustrated by two districts in Illinois, one of which had a population of 914,053 whereas the other had only 112,116. In Ohio, population totals of congressional districts ranged from 698,650 to 163,561. Differences approximately comparable existed in other states. Representatives of urban districts in Illinois took a case to the Supreme Court, contending, among other things, that the equal protection clause of the Constitution was violated by the failure of the Illinois legislature to redistrict the state in terms of population changes. The majority of the Court took the position that it had no power to give relief. Three members noted that

> The one stark fact that emerges from a study of the history of congressional apportionment is its embroilment in politics, in the sense of party contests and party interests.[1]

They admitted the seriousness of existing evils but contended that interference on the part of the Court would represent violation of the prerogatives of Congress.

> To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure state legislatures that will apportion properly, or to invoke the ample powers of Congress.[2]

Any attempt of a state legislature to redistrict a state so as to shift congressional representation to urban areas meets opposition from entrenched interests in rural communities. Such entrenchment is usually strong enough to prevent anything like equitable readjustment. If, after a given census, additional representatives are allocated to a state wherein there is opposition to the disturbance of existing district lines, such new representatives may for a time be elected at large by the state rather than from a newly created district. In the four states which have only one representative each, and in the instance of one or more representatives in other states who may be elected at large because of the failure of state legislatures to increase the number of congressional districts, congressional candidates are nominated along with candidates for governorships and other state offices and candidates for the United States Senate. Congressional and state campaigns are carried on at the same time by the same political parties and may be pretty closely integrated. When, on the other hand, as in most instances, the states are divided into congressional districts, the electoral areas for representatives may correspond much more closely to city-wide or county election areas, or even to districts within municipalities, than to the state-wide areas in which state officers are elected. Congressional elections therefore tend to overlap the elections of local officials more than those of the states. Because of party differences between rural and urban areas,

1. *Colegrove* v. *Green*, 328 U.S. 549, 554 (1946).
2. *Ibid.*, p. 556.

furthermore, there may, as in New York, be a strong tendency to elect Republican congressmen in rural and small town districts and Democratic congressmen in major cities.

States as Senatorial Districts. States at large constitute the districts for the election of United States senators. They are so prescribed by the Constitution, which allocates two senators to every state without reference to its size. While there is no party gerrymandering of senatorial districts and no major problems arise from intra-state shifts in population as in the instance of congressional districts, the constitutional requirement as to the election of senators creates inequities which are almost as serious. For example, while the population of Nevada entitles the state to only one representative, it has two United States senators along with New York, whose population justifies the allocation of forty-five representatives. Within each state there may or may not be a tendency to elect one United States senator from one region and the other from another. In New York, for example, the tendency is to select one senator from New York City and the other from up-state. Illinois is likely to divide its representation between Chicago and some point toward the other end of the state. California political behavior has reflected the same tendency, although the result has not been uniform.

Whether or not the major parties, in the hope of defeating their opponents, tend to nominate senatorial candidates from different regions in a state, the electorate is the state at large. A senatorial candidate, therefore, unlike candidates for the House of Representatives in the larger states, must, like candidates for state offices, address himself to problems which have a state-wide interest. He cannot limit his campaign to issues which are predominantly rural or predominantly urban. In some degree, however, both he and the candidate for the House of Representatives must look beyond even those problems which are state-wide in scope to those which are national —- or at any rate to those which involve other states as well as their own and must be solved at the national level.

The Presidential Area. Although the people vote for President and Vice President not directly but through the electoral college as an intermediary — which will be discussed later — the presidential and vice presidential electoral area is, in effect, the area of the entire United States. The scale of electoral operations is, therefore, enormously greater than the scale of election even of United States senators. Yet campaigns are conducted for the most part by the political parties which elect senators and representatives and state and local officers as well. Party leaders plan their strategy not in terms of Presidents alone, or senators or representatives alone, or state or local officials alone, but in terms of operations in all the various fields. Plans become intermingled beyond all hope of segregation, particularly in those years in which a President and Vice President, one-third of the United States senators, all members of the House of Representatives, and

many state and local officials are elected at or about the same time. National, state, and local problems become entangled in the popular mind and in the electioneering strategy of parties and candidates.

CAMPAIGN STRATEGY

Overlapping Campaigns. Although each candidate for office is concerned primarily with his own election, the prospect of his victory or defeat is determined in part by the total atmosphere created by the many campaigns at various levels. The waging of many campaigns at the same time seems to have a cumulative effect in capturing the attention of voters and inducing them to go to the polls. For example, however great the local importance of primary elections (discussed in the preceding chapter), the fact that they are held at different times in different states and in different communities may mean that they fail to capture enough attention to bring out a substantial vote. On the other hand, a general election at which President, Vice President, senators, representatives, and many state and local officials are to be chosen attracts an enormous amount of attention, stirs up tremendous fervor, and brings out the maximum number of voters. A presidential campaign coinciding with the election of United States senators and representatives results in the casting of many more votes for members of Congress than are cast in years in which no President is to be chosen. To give a typical illustration, the total popular vote cast for presidential candidates in 1944 was slightly more than 48 million, while the total cast in 1946 for members of the House of Representatives was only some 34,500,000. Again, in 1948 the total presidential vote rose to some 48,500,000. The fact that in 1948 more than 500,000 other voters who cast ballots for other offices failed to vote for any presidential candidate does not invalidate the generalization that the coexistence of a presidential election tends to bring out additional votes for senators and representatives. Even though many voters apparently disliked all the presidential candidates — and, in the language of a woman from South Carolina, thanked God that not more than one of them could possibly be elected — and in some instances refrained from casting presidential ballots, the fact remains that the total of electoral campaigning captured enough public attention to bring to the polls a total electorate approximating that of the presidential year of 1944 and much higher than that of the non-presidential year of 1946. It is undoubtedly true, of course, that genuine popularity on the part of either presidential candidate might have added greatly to the total presidential vote and to the total vote for federal legislators as well.

It is not contended that such influence flows in only one direction. It is extremely probable also that, in many instances, local enthusiasm for local candidates draws to the polls people who, being there, cast presidential ballots which, but for the local influence, would not be cast at all. There is no possibility of measuring this influence, however, since presidential

elections are never held separately from the election of members of Congress and of many state and local officials.[3]

It is widely believed that a popular candidate, particularly one for the presidency, helps to carry his party's other candidates to victory. It is apparently true that many people who go to the polls primarily to vote for a presidential candidate vote a straight ticket when they cast their presidential ballot either because they do not really care about the other officers or because of some vaguely defined belief that their vote for President will be strengthened by voting also for his fellows on the ticket. It is possible that the tendency to vote a straight ticket is more widespread in the impassioned period of a presidential election than at those calmer times when only federal legislators and state and local officers are chosen.

Operations of Party Machinery. In general, the various agencies of party organizations — the national committee, the congressional and senatorial committees, and state and local committees — work closely together in behalf of total party victory. They overlap in their campaign propaganda. The same workers seek the election of all party candidates. The committees aid the candidates or even take over altogether the planning of campaign tours. They arrange to bring about the necessary interaction among party candidates. It is carefully arranged, for example, that candidates of the same party help each other by mutual expressions of public esteem. When the presidential candidate is on tour, arrangements are made not only to have him meet local political leaders but also to have him seen with local candidates and exalt both them and himself by words of praise. Party candidates for all inferior offices are encouraged to stir enthusiasm both for themselves and for their presidential candidate by allusion to the party's peerless national leader. Party finances — to be discussed more at length further along — flow through the several committees and overlap in their benefits to candidates at the several levels.

The Services of Experts. In the management of elections as in the management of almost every other major activity from the provision of organized sport to the operations of a banking system, the American people have learned to rely heavily upon experts. An expert is a man who has the skills necessary for getting results in a particular field without necessarily having the ability to determine whether the results are desirable or, indeed, having any major interest in their desirability. An outstanding illustration was Charles Michelson, who from the late 1920's until the early 1940's served the Democratic National Committee as director of public relations, receiving at the end of the period a salary of some $25,000 a year. During his early years in that position, Michelson, perhaps more than any other man,

3. Some clue as to local influence on presidential voting may be secured by comparing presidential votes in local areas for periods when there have been vigorous contests between candidates for the House of Representatives and for local officers with presidential votes in the same areas when local elections have been uncontested whether because of cross-filing or for some other reason.

"hung the depression on Hoover" in speeches which he wrote for members of Congress and other spokesmen. He had the skill of the master in estimating public reactions to the strategy of verbal combat and in phrasing attacks so as to keep the opposition off balance. He had the hand of the surgeon in finding the opposition's point of greatest vulnerability. In the 1940 campaign, for example, he wrote for the use of various Democrats a series of barbed criticisms of Wendell Willkie's campaign speeches. He provoked Willkie into a series of counterattacks against "Boss" Flynn and "Smearer" Michelson. Said Michelson, "It was as simple as that. In three days we had learned that he was thin-skinned so we kept the other fellows answering when they should have been attacking." [4]

Another skillful political expert is Jack Kroll, director of the CIO Political Action Committee. After the 1948 election, Kroll's organization boasted that it had delivered to Congress 137 PAC-endorsed members of the House and 17 senators. "We just deliver congressmen F. O. B. on Capitol Hill," boasted one of his associates. "I am an organizer, not a philosopher," Kroll explained himself. "It's just drudgery — somebody has to wash the dishes." [5] So it is that throughout formal party organizations and related political agencies, skilled craftsmen are kept busily at work behind the scenes, writing speeches, arranging contacts, and in various ways getting specific results desired by parties and candidates. Campaigns, therefore, in addition to partaking of the characteristics of warfare on the one hand and of sport on the other, have also some of the characteristics of a business which employs technicians of various kinds in carrying on its operations.

The Use of Slogans. Whether coined by hired technicians or politicians or picked seemingly out of the air, political slogans may be enormously important in solidifying public opinion back of a candidate. To be effective, a slogan or a political catch phrase must characterize sharply some attitude or situation about which the people feel deeply. When, during the early years of the present century, Republicans claimed credit for national prosperity, while Democrats blamed them for the high cost of living, the "empty market basket" and the "full dinner pail" provided effective political catch phrases. "He kept us out of war" won isolationist and pacifist votes for Woodrow Wilson in 1916. In 1920, Warren G. Harding promised relief from abnormal governmental interference through a return to "normalcy." Republicans during the 1920's promised "more business in government and less government in business." During the early days of the New Deal, Franklin D. Roosevelt denounced the "malefactors of great wealth." Harry Truman found a somewhat less effective phrase in "gluttons of privilege." Through an outpouring of personal indignation, President Truman gave pungency to his denunciations of the "bad 80th Congress," and the

4. Marshall Andrews, "Michelson's Wit Marked Party Speech, Harassed Foes Through New Deal Era," *Washington Post*, January 9, 1948. For Michelson's own account of his career see his *The Ghost Talks* (New York: Putnam, 1944).

5. Hugh Morrow, "The CIO's Political Hot Shot," *The Saturday Evening Post*, March 5, 1949, p. 29.

"worst Congress in American history." All such phrases are intended to embody and articulate popular sentiments of the moment and to bring the people into the desired relationship with particular political parties and candidates. They are instruments and techniques of political appeal and political warfare.

The Behavior of Candidates. Although the various political committees, political leaders, and friends of the candidate can assume a great deal of responsibility for the conduct of a campaign, a great deal is left to be done by the candidate himself. The burden of electioneering as felt by Senator Paul Douglas was discussed in the preceding chapter in connection with primary elections. In the presidential campaign of 1940, Wendell Willkie drove himself virtually to physical exhaustion in spite of the physical ruggedness which was one of his appealing qualities. As part of the price of giving their approval, the people expect the candidate to show himself freely in public, to be available for interview by innumerable people, and to maintain throughout the appearance of a man of good will with unmeasured power in reserve. He must face ridicule and denunciation without being hurt, or, at any rate, without showing the hurt. "Early in my life I learned that politics is no game for the thin-skinned," said Franklin D. Roosevelt, Jr. in 1949 after winning a special election to the House of Representatives as the candidate of the Liberal party in New York.[6]

The broadly effective candidate not only has to make a good appearance in public and to meet individuals easily, but also to speak well over the radio. Presidential candidates in recent years have varied tremendously in radio personality. Herbert Hoover had the habit of punctuating solid sentences with heavy breathing into the microphone, creating the unfortunate impression of a man laboring under great difficulties. Franklin D. Roosevelt, by contrast, had a glowingly confident radio personality and seemed to talk directly and simply to each individual listener. Alfred Landon, the Republican candidate in 1936, had a radio delivery which was defective in almost every way. In the campaign of 1940, the voice of Wendell Willkie sounded harsh and strained, failing to create the impression of self-confidence and power in reserve. Thomas E. Dewey made his presidential appeals in 1944 and 1948 in the well-trained voice of a radio announcer but without that ring of conviction and simple sincerity which is needed to make radio an effective instrument of persuasion. President Truman survived in the 1948 election in spite of his almost complete lack of the art of effective invisible address, no doubt in part because of his attempts to make up for this defect by innumerable personal appearances among the people. Television has not yet more than begun to play its part in politics; within a short time, however, the capacity to make a visible appearance to people at a great distance will become more important in the catalogue of political techniques.

6. Franklin Delano Roosevelt, Jr., "How We Won," *Collier's*, August 6, 1949, p. 12.

Regional Aspects of Campaigns. Every skillful campaigner takes into account the peculiar characteristics of the regions in which he seeks votes. If there are still some regions in which it is politically expedient to kiss babies handed up for that purpose, there are innumerable others in which parents do not want their offspring subjected to the germ-laden osculation of visiting strangers. If in Tennessee in 1948 Estes Kefauver found it expedient in his senatorial campaign to travel with a live coon as a means of provoking hilarity in combating charges of a political opponent, such tactics would have been definitely out of place in New York City, in Rhode Island, or in Iowa. There are areas in most constituencies to which the candidate need not go, either because most of the people will vote against him anyway or because they will vote for him without further invitation. There is no important reason why a busy Republican candidate for the presidency should take time to go to Maine and Vermont, which remained Republican even in the Democratic landslide of 1936. There is ordinarily no reason why a busy Democratic candidate for the presidency should visit those southern states which almost inevitably pile up huge Democratic majorities. For the opposite reason, the opposing candidates are not likely to spend much time visiting the same areas.

As a matter of course, the candidate is likely to talk about agricultural problems when addressing farmers and labor problems when addressing workers. He will talk about irrigation and the public development of electric power not in the heart of New York City or on the well-watered plains of Illinois, but in the arid west where power and irrigation potentialities are known to exist but need to be developed. In times past, when communication was slow and reporting was inadequate, a candidate could make one set of promises to one portion of his constituency and a conflicting set of promises to another without much fear of being called to account. Nowadays, however, with the reporting of almost every significant public utterance of important candidates and with the widespread use of radio, the candidate must be extremely careful about every commitment no matter what the composition of the audience immediately before him. This necessity for extra carefulness, incidentally, may explain in part the tendency to water down campaign utterances until they are virtually meaningless, as did the Republican candidate for the presidency in 1948. The success of the more aggressive Democratic candidate in that election may indicate that courage and the expression of conviction have more appeal than well-phrased but largely meaningless platitudes.

PREDICTING ELECTION RESULTS

The Values of Foreknowledge. One of the pleasing preoccupations of politically minded Americans has always been predicting election results. The sport has been no less enjoyed because most predictions have been highly unscientific and have been deeply colored by the wishes of the respective prophets. Professional gamblers regularly wager substantial sums

on the outcome of major elections, and because of their known skill in estimating chances, the betting odds are often taken seriously by ordinary folk in working out their own prognostications. Professional politicians who know intimately the game of politics themselves often attempt to calculate the odds, and without necessarily gambling on them, record their expectations. The late President Franklin D. Roosevelt made a habit of working out well in advance a prediction of the outcome of elections in which he was involved and filing it away for checking after the returns were in.

It is not merely the fascination of the crystal ball which leads people to anticipate the outcome of elections. The outcome of a major election is important to a great many people. Depending on the outcome, a given candidate will or will not have a particular governmental position. If the position includes the making of appointments, the election may determine whether many of his friends will or will not have government positions. If his policies differ from those of his opponent, the people governed will be affected to the extent of the reach of those policies. People who contemplate donating money to campaign funds will do so partly in the light of their estimate of the success or failure of a party and its candidates. If the candidate can adequately estimate the respective areas of his weakness and his strength, he will adjust his campaign techniques accordingly. In the light of these facts, people make every possible effort to estimate the results of elections well in advance.

Public Opinion Polls. Businessmen have long known that they could estimate with fair accuracy the reaction of the public toward a given product or a given type of service by making sample inquiries among the groups involved. The technique was extended to elections by collecting what were called "straw votes" from small portions of the electorate. From about 1916 to 1936 a then widely read magazine, the *Literary Digest*, attracted a good deal of attention by collecting straw votes based on telephone directories and other lists. Its gross miscalculation in 1936, when it predicted the election of Alfred Landon to the presidency in the face of a landslide for Franklin D. Roosevelt, brought derision upon the *Digest* just as other polls with more scientific methods of selection were getting under way. We have now a number of polls which attempt to make election predictions. Perhaps the best known among them is that of the American Institute of Public Opinion which is conducted by George Gallup. Others are the *Fortune* poll, conducted by Elmo Roper, and the Crossley poll.

These and lesser polling agencies, instead of utilizing merely telephone directories, automobile registration lists, or other such aggregations of names, select samples with great care in terms of sex, party membership, past political action, and place of residence, with the latter including differentiation among sections of the country to be sampled, rural or urban residence, and residence in cities in various population categories. The leading pollsters are convinced that the sampling technique can be so perfect as to enable them at any time to predict the action of the total elec-

torate with a very small percentage of error. George Gallup, indeed, talks in terms of a margin of error reduced to a mere five per cent.

The Success of Polling Predictions. The achievement of the pollsters has indeed been phenomenal. The correlation of large numbers of elections with predictions previously made demonstrates the fact that by the taking of carefully planned samples almost infinitely small, it is possible with a high degree of accuracy to estimate what the entire electorate will do.

All the polls suffered high discredit after the 1948 presidential election, however, because the predicted Republican victory failed to materialize. The discredit resulted from the fact that the people had come to expect too much accuracy of prediction, partly because of the over-confidence and excessive claims of the pollsters themselves. Although none of them had claimed perfection for their techniques, they had been confident in their prediction even in areas where a relatively slight margin of error might render predictions invalid. On September 9, 1948, approximately two months before the election, Roper declared confidently that the election of Governor Dewey to the presidency was a foregone conclusion and that there was no point in taking any more polls. His prediction proved farthest afield of the three major polls, but the other two also erred in the same direction. President Truman won 49.5 per cent of the popular vote for the presidency. Gallup's estimate had been 44.5 per cent, Crossley's 44.8 per cent, and Roper's 37.1 per cent. While the Gallup estimate was only five per cent wrong and the Crossley estimate a little less than that, the difference meant the election of Truman rather than of Dewey.

The failure of the three major polls to predict the election of the actual winner led to an enormous amount of self-examination on the part of the polling organizations and other agencies.[7] While the investigations and discussions have disclosed remediable defects in polling procedures, it seems clear that one of the major problems has been that of excessive claims on the part of the pollsters. There is as yet no way of collecting some of the data necessary for determining with complete accuracy what the people will do at the polls. To give a simple example, a statement made some time in advance of the election that a given voter expects to go to the polls and vote for one candidate rather than another does not tell how deeply he feels on the subject or whether he will actually go to the polls if the duties of his job or the demands of his home or the attraction of a football game or an evening at bridge compete for the time needed for the trip to the polls. If the voter has little liking for either candidate, he may vent his disapproval of one of them by advance promises to vote for the other, and then take his revenge against the second candidate by voting for the first. He may do as half a million voters apparently did in the

7. See for example the Social Science Research Council study by F. Mosteller, and others, *The Pre-Election Polls of 1948* (New York: Henry Holt, 1949), and Norman C. Meier and Harold W. Saunders, *The Polls and Public Opinion* (New York: Henry Holt, 1949).

presidential election of 1948 — vote for candidates for other offices but fail to bring himself to vote for either candidate for a particular office.[8]

There is as yet no accurate method for predicting the effect of pollster predictions themselves upon the voting which is predicted. George Gallup and others in the polling business challenge the commonly prevailing assumption that the desire of people to get on the band wagon is likely to bring a shifting of votes to a particular candidate because his election is predicted by polling organizations. They contend that sympathy for the underdog may have quite as strong an influence in the opposite direction. The effect of such predictions upon candidates is likewise unpredictable. The assurance that victory was in his hands may have made Governor Dewey over-confident in 1948, leading him and his party to do less than their best in the campaign. Repeated predictions that his prospects were hopeless may have offered such a challenge to President Truman as to bring out a greater effort than he would otherwise have made. Certain it is that the prediction that he would be defeated demonstrated the superficiality of the friendship felt for him by a large number of band wagon politicians. It seems clear that the expectation of his defeat explained in part the difficulty of the Democratic party in getting funds for campaign purposes. All in all, however, the results of advance prediction, whether for better or for worse, are far from clear.

THE IMPACT OF MINOR PARTIES

The Measure of Dissent. Minor parties may make doubly difficult the prediction of election results. Although most of them have special emphases which lack universal appeal, they have a tendency to attract the votes of dissenters from the major parties whatever the bases of dissent. Since it is impossible to estimate in advance the extent to which dissenting voters will retain their disgruntlement with major parties until election day and then express it at the polls, it is likely to be harder to estimate total votes for minor than for major candidates. In some instances it may also be hard to tell which major candidate will lose most as a result of defections to a minor party candidate. A heavy inroad at the polls upon the candidate of one major party or the other may, in a close race, decide which one will be the winner.

If a minor party is genuinely concerned about governmental reform it may find that the filing of candidates threatens its actual purpose. It may take more votes from the major party candidate who is closest to its own position than from the one who is farthest away, and thus bring about the election of the latter. During the summer of 1948 liberal voters feared that in many areas Henry Wallace's Progressive party would take votes away from liberal Democratic candidates without garnering enough for Progressive victories and therefore would bring about the election of conservative Republicans. In September 1948, under the pressure of liberal

8. See Lindsay Rogers, *The Pollsters* (Toronto: McClelland & Stewart, 1949).

criticism, the Progressive party withdrew more than a dozen of its congressional and senatorial candidates whose running for office might endanger the success of liberal Democrats and announced its direct or indirect support of many Democratic candidates. It seems clear that some Democratic candidates owed their election to the forbearance of the Progressives. An amusing play of inter-party politics took place in Illinois where a liberal Democratic candidate, Paul Douglas, was running against a conservative Republican. Noting that Douglas had made some "vicious remarks about the Progressive party," the Progressive campaign manager refused to support Douglas.[9] The Progressives were being kept off the Illinois ballot, however, by a state statute which, in addition to requiring a petition signed by 25,000 voters before a new party could be placed on the ticket, required also that the 25,000 must include 200 signatures from each of at least 50 of the 102 counties in the state. The Progressives had no difficulty in raising the total number, but they apparently found it impossible to get the requisite distribution. With their cause abetted by the Republican organization in the state, which was eager to have a Progressive candidate for the Senate on the ballot in the hope that the three way split would result in a Republican victory, the Progressives brought suit in a federal court to get the state law declared unconstitutional and, when they lost the decision, they appealed to the Supreme Court. Unfortunately for the Progressive-Republican strategy, the Supreme Court held the statute constitutional,[10] the Progressives were kept off the ballot, and Republican candidates for the Senate and for other offices were snowed under by a Democratic victory.

Minor Parties in Presidential Elections. Various minor parties have from time to time elected candidates to membership in Congress and to state and local offices. When such a party elects a candidate to the presidency, it by definition becomes a major rather than a minor party. No such victory has been won since the election of Abraham Lincoln as a Republican candidate for the presidency in 1860. Since that time a minor party has from time to time picked up some votes in the electoral college, but only in 1912 did such a party, the Progressive party of Theodore Roosevelt, find its way into second place. In that election a Republican split brought victory to Woodrow Wilson, the Democratic candidate. In 1948 it was widely believed that the defection of southern Democrats who followed J. Strom Thurmond, the nominee of the States' Rights party, coupled with the loss of votes to Henry Wallace's Progressive party, would bring about a Democratic defeat and the election of a Republican President. President Truman was the victor, however, in spite of the fact that Thurmond captured Alabama, Louisiana, Mississippi, and South Carolina while the Wallace vote then seemed to be placing New York State in the Dewey camp. The decline of the Wallace vote from an estimate of something in

9. *New York Times*, October 1, 1949.
10. *MacDougall* v. *Green*, 339 U.S. 281 (1948).

the vicinity of 5 million to a little more than one million punctuated the difficulty of predicting the votes to be won by minor party candidates.

The minor parties mentioned are only those which polled a considerable number of popular votes. In 1948, in addition to the Progressives and the States' Rights (or Dixiecrats) parties, minor parties offering presidential candidates included the following: the Socialist party, Socialist Workers, Socialist Labor, Greenback, Prohibition, Vegetarian, and Christian Nationalist Crusade.[11] Whereas Wallace and Thurmond drew more than one million votes each, Norman Thomas, next in line as a sixth-time Socialist candidate, polled only little more than 130,000. Claude A. Watson, for the Prohibition party, polled a little more than 100,000 votes. Edward A. Teichert of the Socialist Labor party polled just under 28,000 votes. The remaining candidates polled a total of just over 16,000 votes.[12] With the total number of votes cast for any presidential candidate just under 50 million, it is obvious that only the stronger of the minor party candidates need be seriously taken into account.

GOVERNMENTAL REGULATION OF ELECTIONS

State Action. Any process as complicated as that of operating a general election and involving such interplay of powerful and varied interests inevitably requires a great deal of careful regulation. The framers of the Constitution apparently assumed that members of Congress would be elected in the same elections at which state and local officers were chosen. They placed on the states the primary responsibility for the conduct of congressional elections, saying in Article I, Section 4, that "the times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof." They reserved the right of federal supervision, however, by the added provision that "the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators." They provided in Article II, Section 1 that presidential electors should be chosen in each state "in such manner as the legislature thereof may direct."

As a result of these constitutional provisions and of popular attitudes toward the control of elections during the early years under the Constitution, the great body of legislation affecting elections has consisted of state laws, which have many resemblances from state to state but which also differ considerably. The states have traditionally decided when elections should be held and have prescribed the rules and regulations governing methods of balloting, the counting of votes, the punishment of election fraud, and other matters. Even today, state legislation with respect to elections still widely prevails, in spite of a steadily increasing amount of federal supervision.

11. *New York Times,* October 31, 1949.
12. *New York Times,* December 11, 1949.

Federal Intervention. Federal intervention in the control of elections usually comes about when the states fail to cope adequately with serious evils either because of inability or unwillingness to do so. The first important federal measures came just after the Civil War in the form of measures commonly known as Enforcement Acts which were adopted to protect the political and other rights acquired by Negroes through the Thirteenth, Fourteenth, and Fifteenth Amendments. White politicians in many of the southern states were determined to handle elections in such a way as to nullify the political influence of the colored people. The federal statutes were intended to prevent such nullification. Congress prescribed punishment for fraud in elections at which federal officers were chosen and punishment also for intimidation of voters to prevent their going to the polls. Although the measures may well have been enforced with indifferent success, they mark the intervention of the federal government into the control of elections along a broad front.

Congress has also legislated broadly with respect to other matters affecting elections. As mentioned above, it has prescribed in a general way the districting of the states for election of members of Congress which is to be carried out by the state legislatures. With an exception which applies only to the state of Maine, where a state constitutional provision provides for an earlier election, Congress has provided that federal elections shall be held on the Tuesday after the first Monday in November. Other federal statutes have reflected concern about the growing influence of particular groups in connection with elections. Attempts have been made to curtail the influence of corporations, labor organizations, and wealthy persons which is exerted by the use of money in elections, and the influence of politicians or political parties which is derived from the fact that a particular party is in power and that certain government employees owe their positions to the favor of the "in" party.

Problems of Finance. With a potential electorate of some 90,000,000 people, tremendous sums of money are required to finance the election of national, state, and local officers. Even though the total vote cast in any election is not likely to be more than approximately 50 million, the total potential electorate must be considered in the planning of campaigns, and indeed perhaps non-voting segments of the population also, since people in their teens and aliens in particular areas may help to shape the body of public opinion which determines the course of an election. If a presidential candidate did no electioneering beyond sending out a one cent postal card to each of 90 million people, the cost of the cards alone would run to $900,000. Even if the party members addressing and sending out the cards consisted largely of volunteer workers, the additional cost of office space, typewriters, and other equipment would be substantial. No presidential candidate who has any hope of winning can limit himself to sending out a single postal card to every potential voter or rely exclusively upon volunteer assistance. He must challenge the attention of the people

from every possible direction. He must make public appearances all over the country with consequent expenditures for transportation, auditorium or amphitheatre space, visiting headquarters in the best hotels, and banquets for visiting politicians. He must have ample radio time on national networks. His candidacy must be advertised by means of newspapers, billboards, circulars, and hand bills.

Throughout our history, the belief has prevailed in some quarters that beyond the smallest sum all expenditures for the winning of elections represent an evil or at least a display of bad taste. It is argued that the office should seek the man, not the man the office. This theory may be sound for local elections in communities where most of the people have intimate acquaintance with all who have any prospect of being chosen for office. It may provide a pleasant fiction for use in other elections. In nation-wide or state-wide elections, however, or elections in congressional districts, candidates and the parties which support them must engage in widespread publicity campaigns if people are to be persuaded to go to the polls and vote "right." Even in the midst of a presidential campaign, the prevailing ignorance about officeholders and candidates for election is appalling. In October, 1944, for example, the American Institute of Public Opinion found that only sixty-seven percent of the voters could name the Republican vice presidential candidate and that only sixty-two percent could name the Democratic vice presidential candidate, the man who became president half a year later upon the death of President Roosevelt. In January, 1945, the same organization found that only forty-two percent of the voters could name correctly both the United States senators from their respective states. Thirty-four percent could name neither senator and twenty-four percent could name only one. In August, 1945, only fifty-eight percent of the voters knew the number of United States senators who represented their states, in spite of the fact that the number has been fixed at two ever since the Constitution went into effect. In January, 1946, only thirty-one percent of the voters knew that an election would be held that year, at which members of the House of Representatives would be chosen. Only fifty-one percent of the voters could name correctly the representatives from their respective congressional districts.[13]

These findings indicate the amount of elementary educational work that must be done if people are to be persuaded to vote at all and to exercise even a minimum of sound judgment in doing so. The expenditure of money on political campaigns, therefore, may actually result in great service to the public interest in spite of such distortion as may be involved in over-emphasizing the merits of a particular candidate or a particular party.

Sources of Party Funds. It has been estimated that, in terms of both recorded and unrecorded totals, the cost of each of a number of recent

13. American Institute of Public Opinion, *The Gallup Political Almanac for 1946* (1946), p. 212.

national election has run to some $40 million,[14] and those sums are raised not through taxation, but through at least technically voluntary contributions. In times past the collection of campaign funds has come closest to taxation when the political party in power in a given community, acting not as a government but as a party, has levied assessments on its own members holding public office to raise money in order to keep such offices within the gift of the party by winning ensuing elections. Even apart from the general outlawing of party assessments, however, most campaign funds are raised with less obvious evidence of coercion, and oftentimes without any such evidence whatsoever. Most major contributors to party funds give money in the hope of helping put a political party or a particular candidate into office, or of keeping that party or that officer in a position of power. The underlying motives of donors are varied and oftentimes hard to discover. Contributions are often made because the donors need friends and acquaintances among politicians and government officials to enact or enforce tax measures, regulatory measures, others which bear upon particular businesses. Party promises with respect to taxation or regulation or protection of the rights of labor or other matters may differ sufficiently to induce a businessman to contribute to the funds of one party rather than of the other. Some donors make contributions to both major parties in the hope of building good will for all eventualities. Donations may be made and other services rendered because the donor aspires to a cabinet position, an ambassadorship, or some other high office for himself or for a friend. It seems probable that in some circles contributions are made to campaign funds because it is the praiseworthy thing to do, just as the same or other individuals take community leadership by making large contributions to community chests, the Red Cross, and other charitable organizations.

Proposed Governmental Financing. Without questioning the public services rendered by political parties, many people do question a system of party financing which enables or may enable donors to win offices for themselves or for their friends, or to influence the course of legislation or administration by contributing to campaign funds. After the election of 1948, Senator Henry Cabot Lodge proposed study of a project for governmental financing of presidential campaigns. He made a statement which read in part as follows:

> There is probably not a man in public life today who does not realize that our system of financing presidential campaigns by means of contributions from individuals and officers of corporations has led in the past — and continues to lead today — to most unfortunate, unhealthy, and some-

14. See Clayton Knowles, "Campaign is Costliest in History of Nation," *New York Times*, October 24, 1949. The best current materials on the financing of federal elections are books by Professor Louise Overacker, including *The Presidential Primary* (New York: Macmillan, 1926) and *Money in Elections* (New York: Macmillan, 1932), and various of her articles including particularly quadrennial articles in *The American Political Science Review*.

> times pernicious results. This is because many of those who make these contributions do so in the expectation that there will be value received in return for their generosity. This may take differing forms, one of which is an appointment to some executive post in the government.
>
> As long as we permit such contributions we will always hear of an office market in government, regardless of which party is in power, for the problem is definitely not a partisan one.[15]

Whether or not such reports were true, argued Senator Lodge, it was a bad system which could give rise to such reports.[16] All of this talk of an "office market," of putting high executive and diplomatic positions on the auction block, and the accompanying suspicion and cynicism would disappear overnight, he believed, if the primary cause of the evil were obliterated at its roots. He therefore favored enactment of a statute which would forbid private individuals or officers of corporations from making any campaign contributions whatsoever. Instead, he would have the United States government contribute some six or eight million dollars to each major party for presidential campaign purposes.

The Lodge proposal for governmental financing of presidential campaigns has never been worked out in detail, much less applied to an actual election. It seeks to cope with a major evil in our governmental system, but it is probably vulnerable nevertheless to major criticisms which attach to much less drastic schemes of regulation which have been accepted.

Governmental Supervision and Restraint. For more than a century the federal government made no attempt to control the financing of elections at which federal officers were chosen. Then, in 1907, urged to action by President Theodore Roosevelt, Congress attempted to reduce the influence of powerful organizations in elections by forbidding national banks and corporations organized under acts of Congress to make campaign contributions, and by forbidding any corporation to make a contribution toward the election of any federal officer. The statute was defective in that the contributions Roosevelt sought to forbid could still be made through corporation officers and stockholders, but it marked the beginning of attempts to regulate the use of money in federal elections in such a way as to have an obviously corrupting influence upon the government.

Other measures have since been enacted from time to time, including an important statute in 1910, The Federal Corrupt Practices Act of 1925, the so-called Hatch Act of 1939, another Hatch Act of 1940, an important rider attached to the Smith-Connally War-Labor Disputes Act of 1943, and the Taft-Hartley Act of 1947.

These various statutes, to the extent to which they remain in effect, constitute informally a code for the regulation of elections at which federal officers are chosen. One of the many important provisions included in the 1925 statute is that requiring that accounts of political contributions in fed-

15. *Congressional Record*, July 6, 1949, vol. 95, part 7, p. 8888.
16. See articles by David Lawrence and Arthur Krock, reprinted, *ibid.* pp. 8889–90.

eral elections be filed with the Clerk of the House of Representatives in full detail on given dates. While a political committee which accepts contributions from the vice interests of a great city is not necessarily violating any statute in doing so, it may be embarrassed by the necessity of making the contribution public. Knowledge of this fact may well prevent acceptance of contributions and any implied commitment of political reward. A major difficulty, unfortunately, is that of enforcing the statute so as to compel the reporting of all contributions. There are innumerable ways of concealment or of expenditure of funds for the benefit of parties or candidates outside the regular channels.

The several statutes outlaw various activities in connection with political campaigns. For such force as the provision may have, candidates are forbidden to promise to appoint or to support the appointment of anyone for the purpose of procuring support for candidacy. The purchase and sale of votes is forbidden. Persons or firms having or seeking contracts through the federal government are forbidden to make campaign contributions. The right of Civil Service employees to participate in political campaigns is restricted both to prevent the coercion of those employees by political leaders and to prevent the aggregation of employees from exercising undue influence over elections. In reaction to the trend whereby, under the New Deal, the political position of labor was greatly strengthened, labor unions as well as corporations are now forbidden to make campaign contributions. Individual contributions to any campaign committee are limited to $5,000. Candidates for the Senate and for the House of Representatives are forbidden to expend more than $10,000 and $2,500 respectively; or, alternatively, the expenditure may be measured by the number of votes cast at the last general election in the electoral area in question, but in no event may the senatorial candidate expend more than $25,000, or the candidate for the House of Representatives more than $5,000. No political committee may receive or expend more than $3,000,000 in any one year.

Effects of Regulations. The process of enacting regulations such as these is extremely delicate. The legislators who enact the rules are prominent among the people whose activities are regulated. They are likely to be torn between the desire to improve the electoral process generally and the desire to protect or improve their own political positions. In any event, as already indicated, whether because of the difficulty of the regulatory task or of the unwillingness of the legislators to plug all loopholes, some of the regulations enacted have proved extremely vulnerable.

Prominent among the vulnerable provisions have been those seemingly calculated to restrict the total amount of money expended in elections. One such provision is that which restricts each political committee to an expenditure of $3,000,000 annually. In neither major party can the national committee manage a national presidential campaign, as campaigns are now run, on this relatively small sum. The barrier, however, is not insuperable. While the national committee themselves presumably act within the finan-

cial limitations of the statute, some of the millions of dollars which, in the absence of the statute, would have been collected by and expended through those committees, are now handled largely by diverse other committees.

In the 1944 presidential election, for example, the following committees collected from more than $100,000 to more than $1 million, for use of the Democrats: Businessmen for Roosevelt; CIO–PAC; Democratic Campaign Committee of Philadelphia; Hollywood Democratic Committee; International Ladies' Garmentworkers Union Campaign Committee for Roosevelt-Truman; Independent Voters Committee of Arts and Sciences for Roosevelt; NC–PAC; National Independent Committee for Roosevelt and Truman; One Thousand Club Roosevelt Campaign Committee. The following committees collected from more than $100,000 to more than $1,500,000 for Republican use: Republican Finance Committee of Connecticut; Republican Citizens Finance Committee of Illinois; New Jersey Republican Finance Committee; United Republican Finance Committee of Metropolitan New York; Republican State Central and Executive Committee of Ohio (including Ohio Finance Committee and Ohio Campaign Committee); Republican Campaign Committee of Allegheny County; Republican Finance Committee of Pennsylvania; American Democratic National Committee; Democrats for Dewey; Maryland Committee; New York Republican County Committee.[17]

Various other organizations accumulated funds for use in conjunction with the not-more-than $3,000,000 which the national committees were permitted to expend. Before the enactment of the two Hatch Acts it was customary to say that the congressional campaign committees, of which there is one for each major party in each house of Congress, are important primarily in non-presidential election years, surrendering leadership in presidential election years to the national committees. It was noted in 1948, however, that the two senatorial campaign committees were sending considerable sums into various strategic areas to aid particular senatorial candidates. To give a few examples, the Republican Senatorial Campaign Committee sent $28,250 to Colorado to aid a Republican in ousting Democratic Senator Edwin C. Johnston. It sent $26,500 to Iowa to protect the seat of Republican George A. Wilson. It sent $22,200 to Tennessee to support Republican Carroll Reece in his race against Democratic Estes Kefauver. It sent $20,000 to Minnesota in attempts to protect Republican Senator Joseph H. Ball in his contest with Democratic Hubert H. Humphrey. Various other Republican candidates received similar aid from the Republican Congressional Campaign Committee. Though the Democratic Senatorial Campaign Committee had less money to spend than its Republican counterpart, it sent substantial sums to West Virginia, Illinois, Iowa, Minnesota, Tennessee, Delaware, and other states.[18] It is to be assumed that the allocation of these funds was substantially the same as if all of

17. See Table III, Louise Overacker, "Presidential Campaign Funds, 1944," *American Political Science Review*, Vol. XXXIX (October, 1945), p. 902.
18. See the report summarized in the *New York Times*, October 30, 1948.

them had been raised by national committees of the two major parties and allotted by the central committee for local expenditure.

So it is that the limitation of each political committee to the expenditure of not more than $3 million each year has had the effect not of limiting the total amount expended in political campaigns, but merely of providing for the decentralization of collection and expenditure. It is perhaps to be doubted whether Congress has any effective desire to limit total expenditures, and perhaps whether total expenditures could be effectively limited even if a statute carefully drafted to that end were adopted. Even if Congress succeeded in restricting expenditures by organizations which were political in name, it would be next to impossible to prevent the spontaneous and actually well subsidized presentation to the public of the merits of particular candidates, particular issues, and particular parties. The presentation of candidates, issues, and parties indeed is an essential part of the democratic process. The problem involved is the flow of funds which is so directed as to enhance the cause of particular interests.

Subject to evasion also have been those provisions of statutes which have prohibited political contributions by corporations and have limited the amounts of those by individuals. Although corporations may not contribute directly, their officers and stockholders and members of their families may do so. While individual contributions to particular political committees are limited to $5,000, there is nothing to prevent the making of $5,000 contributions to any conceivable number of political committees by each member of the family of an officer of a corporation, and there is no way of preventing corporations from adjusting the salaries of their officers partly in terms of family contributions made to political committees. The records show ample evidence of such evasion of restrictions. In 1944, for example, one member of the Du Pont family made contributions to twelve different Republican committees.[19] Before the 1948 campaign had reached its close, it was reported that members of the Du Pont family had contributed in the neighborhood of $50,000 to various political committees.[20]

Another technique of avoiding congressional restrictions on campaign expenditures has been to make expenditures on the behalf of parties or candidates other than through "contributions" which are forbidden or restricted. Corporations and labor unions, operating directly or through subordinate organizations, can carry on extensive campaigns on their own initiative without making "contributions" to any political committee. In the Taft-Hartley Act of 1947, Congress attempted to plug this loophole by declaring it to be unlawful "for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election" at which federal officers are chosen. It was thought that the revised statute might prevent even the endorsement of a candidate for federal office if such endorsement involved the expenditure of any money.

19. Louise Overacker, "Presidential Campaign Funds, 1944," *American Political Science Review*, Vol. XXXIX (October, 1945), p. 911.

20. See Clayton Knowles, "Campaign is Costliest in History of Nation," *New York Times*, October 24, 1948.

Soon after enactment of the provision, the CIO and its President, Philip Murray, were indicted for publishing in a labor paper called *The CIO News* an endorsement of a candidate for Congress. The union, it seems, published the endorsement for the deliberate purpose of testing the constitutionality of the statute which it challenged as an infringement of the constitutional guarantee of freedom of speech and freedom of the press. The indictment was dismissed in a lower federal court, and an appeal was quickly taken to the Supreme Court. The Supreme Court held that the prohibition of expenditures included in the statute did not extend to publications of this kind where there was no showing of expenditure of union funds for free distribution of the newspaper to those not regularly entitled to receive it.[21] The Court did not say what position it would take on expenditures for handbills, billboard advertising, radio time, and other facilities for public expression. It remains to be seen, therefore, whether the statute covers such expenditures and whether, if it does, it will be found unconstitutional as an infringement of freedom of speech and freedom of the press. If the statute does not apply in this fashion, or if it applies but is found unconstitutional, we still have a serious gap in restrictions on expenditures for political campaigns.

Party Differences in Financial Matters. Republicans usually raise and spend substantially more money than do Democrats. Of the more than $20,500,000 officially recorded as spent in the presidential election of 1944, for example, the Democrats spent slightly less than $7,500,000, whereas the Republicans spent more than $13,000,000. Large contributors play a greater part in Republican than in Democratic party finance. Republicans who make large-scale donations include the Du Ponts, the Rockefellers, the Mellons, the Grundys, the Pews, the Wideners, the Guggenheims, and the Vanderbilts. Although the Democrats have a few large-scale contributors, including such men as W. Averill Harriman, Herbert H. Lehman, Charles Luckman, William D. Pawley, Charles P. Skouras, Homer Cummings, Francis Biddle, Tighe Woods, and Charles F. Brannan,[22] the list is by no means as long or as productive as the list of affluent Republican contributors. Bankers, brokers, financiers, and manufacturers, while providing funds to some extent to both political parties, seem to have a greater affinity for Republicans than for Democrats.

Democrats, therefore, must rely more extensively on smaller contributions than do Republicans. During their current period of presidential power, Democrats have raised thousands of dollars each year through Jackson Day dinners which are held all over the country. In Washington, where the President himself attends and speaks, a $100 fee is likely to be collected from each guest for a $10 dinner. Guests at other dinners held throughout the country, and also sometimes in Washington for people

21. *United States* v. *C.I.O.*, 335 U.S. 106 (1948).
22. See Clayton Knowles, "Campaign is Costliest in History of Nation," *New York Times*, October 24, 1948.

who cannot afford the maximum payment and who hear the President only over radio, pay smaller amounts. Attendance is technically voluntary, and it may reflect great enthusiasm for the party and its leaders. There were times during the New Deal period, it is true, when attendance on the part of some government workers was virtually compulsory, and when the fee was collected virtually as a party assessment. In mushroom emergency agencies which were filled with non-Civil Service employees, lists were sometimes sent around for signature by those who were purchasing tickets. The absence of evidence of payment was exceedingly embarrassing for those who failed to buy tickets, whether for want of enthusiasm for the party cause, or on the basis of more individual courage than was possessed by the purchasers of tickets.

The flow of funds is a matter of great sensitivity. Factors which stir enthusiasm or pessimism, or which promote friendships or antagonisms, are quickly felt. At the time of the Jackson Day dinner of 1948, the planners of Democratic strategy inadvertently endangered an important flow of Democratic funds. In most areas in which critical election battles are fought between Democrats and Republicans, the national committee of each party and the congressional committees distribute funds for local use. In the southern states, however, where party conflict has normally been at a minimum, there has been no great need for financial aid from national headquarters. Instead, there has ordinarily been a substantial flow of funds from Democratic state campaign chests into the coffers of central committees. At this time, however, President Truman's vigorous sponsorship of a program of civil rights on behalf of southern Negroes so antagonized southern Democratic leaders that many of them not only refused to contribute to or attend Jackson Day dinners — or Jefferson-Jackson Day dinners as they were called on this occasion — but also threatened to withhold financial support from the national ticket if President Truman adhered to his civil rights program. The rift in the party which was threatened at this time culminated in the Dixiecrat secession, with the consequent loss not only of funds but of electoral votes as well.

THE PROCESS OF ELECTION

Action at the Polls. Except in Maine, where pursuant to the state constitution elections are held earlier, the popular vote on federal candidates is filed on the first Tuesday after the first Monday in November of even years. On that day the workers of both major parties make every effort to get out the vote of their constituents. The accidental occurrence of good or bad weather on that day may have a great deal to do with the outcome. If the constituents of one party are predominantly rural and those of the other predominantly urban, weather which makes it difficult for rural voters to get to the polls may determine the outcome of the election.

Although arrangements differ somewhat from state to state, all voting is done by secret ballot. The opportunity for coercion is thereby reduced,

and so is the temptation of candidates and party leaders to buy votes, since it is impossible to tell whether a voter who sells his vote actually delivers it. The use of voting machines for registration and automatic counting of votes is increasing steadily, and is adding to the accuracy of the electoral process as a measure of voter sentiments.

As already stated, the people who may vote in federal elections are those who in each state are authorized by law to vote for the members of the most numerous branch of the state legislature. According to varying state laws, the voters must be registered in advance of the election. In one state, Arkansas, payment of a poll tax takes the place of registration. In a group of states now reduced to only five — Alabama, Mississippi, Tennessee, Texas and Virginia — previous payment of a poll tax is a requisite for voting.[23] Qualifications for voting in terms of minimum period of residence, education, and other standards are prescribed by the states. With the exception of Maryland, New Jersey, Pennsylvania, and South Carolina, and also of New Mexico except for members of the armed forces, the several states offer in varying degrees the opportunity of filing absentee ballots for election purposes when attendance at the polls is inconvenient.[24]

The polls are open for voting roughly from sunrise to sunset, with some variation in the rules from state to state. When the polls are closed the counting process begins, with both major parties watching it carefully to prevent fraud on the part of the opposition. Where voting machines are used, results are available comparatively quickly, and announcements begin to be made over the radio. The evening of a presidential election is usually a period of great excitement as returns begin to trickle in and as trickles develop into streams indicating the major course of public sentiment. Along with news of the presidential election comes news about the fortunes of United States senators, representatives, and state and local officers. Results in many states are usually decisive enough to show victory or defeat for important candidates within a few hours. Results in other states may be so close as to leave the outcome in doubt for a considerable period of time. In presidential elections the final outcome is likely to be clear enough so that the losing candidate sends his victorious opponent a telegram of congratulation sometimes before the morning of the following day. There are important exceptions, however. In 1916, Charles Evans Hughes, the Republican candidate, retired in the mistaken conviction that to all intents and purposes he had been elected president of the United States. In 1948, most of the night after the election had passed before disillusioned and disappointed Republicans abandoned their plans for parties and celebrations, and it was not until well into the next day that the reelection of President Truman was clearly established.

Electing Presidential Electors. For the sake of brevity, the election of the

23. See Absentee Voters Bureau, Democratic National Committee, *You Can Vote: Summaries of State Registration and Voting Laws* (1948).
24. *Ibid.*

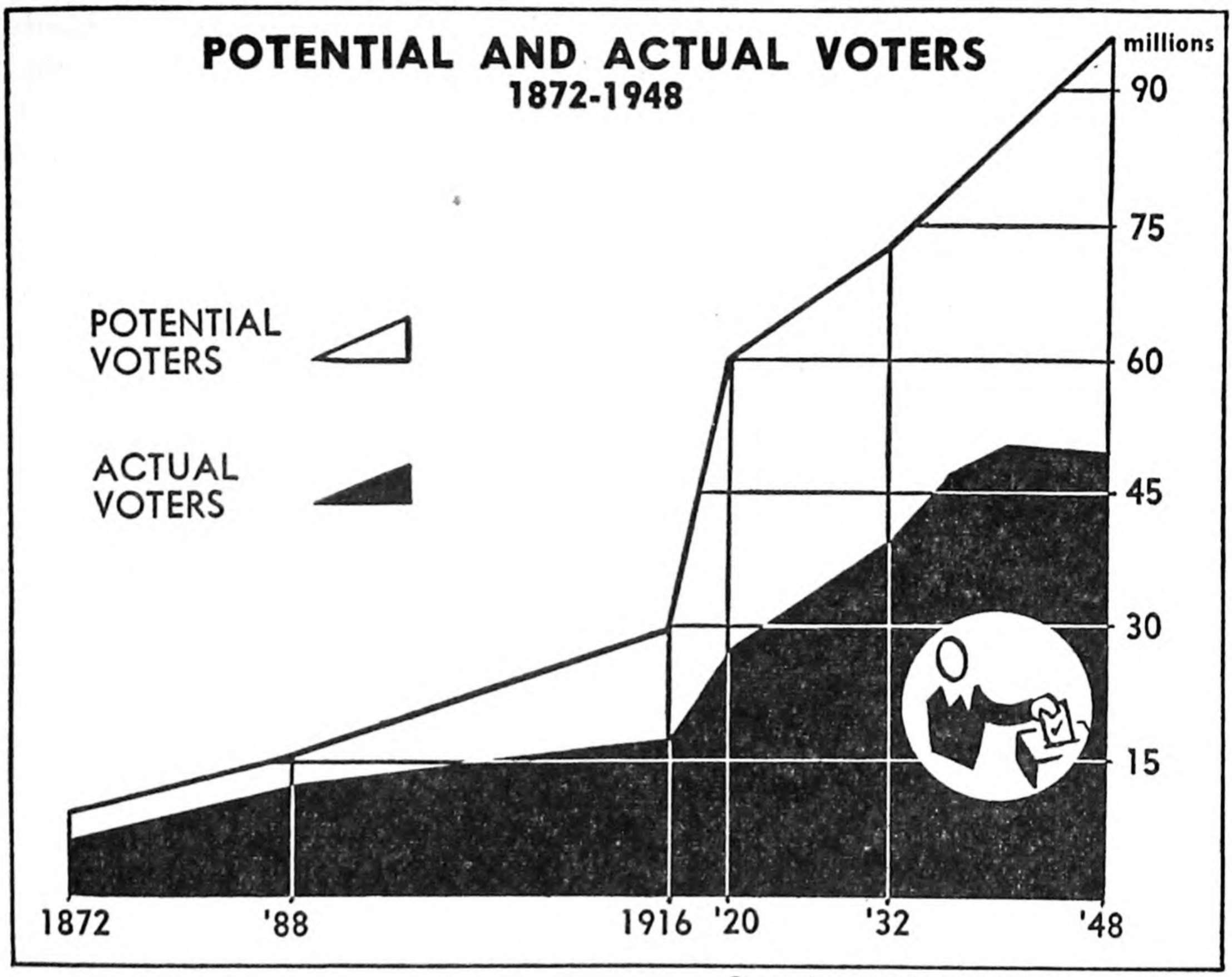


Chart by GRAPHICS INSTITUTE, N.Y.C.

NOTE HOW THE NUMBER OF ACTUAL VOTERS FAILS TO PARALLEL THE NUMBER OF POTENTIAL VOTERS

President and Vice President has thus far been discussed as if voters were permitted to vote directly for the candidates. In actuality, they do not vote for these candidates at all. Rather, they vote for lists of presidential electors which are submitted by the respective parties; the proposed electors are usually pledged to vote for the respective party candidates for president and Vice President, and in some areas are required to do so by state law.[25] The number of electors in each state is determined by the total number of representatives and senators in Congress to which the state is entitled. The arrangement gives some advantage to the small states, since although the number of each state's representatives in the House of Representatives is determined roughly by population, representation in the Senate is equal for all the states, whatever their population. The electors are voted for, not individually, but en bloc. They owe their places on the ballot not to any peculiar competence to perform any particular service, but rather to the fact that they have in the past rendered faithful service to their party.

At a prescribed date after the general election, the electors meet in their respective state capitals and cast their votes for President and Vice President

25. For discussion see Ruth C. Silva, "State Law on the Nomination, Election, and Instruction of Presidential Electors," *American Political Science Review*, Vol. XLII (June, 1948), pp. 523–29.

according to the mandate which they have received at the polls. In the event that groups of electors meeting in separate state capitals fail to agree upon a presidential candidate to the extent of giving a majority vote to one man, the election is thrown into the House of Representatives. Election by the House represents still more sweeping deviation from the principle of popular representation, in that, pursuant to the Constitution, each state has only one vote. That is, no matter how many or how few the representatives from a particular state, that state casts one of forty-eight ballots in the election of the President. Since electors from the several states were not to meet in a single place and debate and struggle for agreement with respect to candidates, and since the founding fathers seem not to have contemplated the development of a two-party system in terms of which most Presidents would be chosen, the framers probably presumed that in most instances the President would be chosen by the House of Representatives. In actuality only two Presidents, Thomas Jefferson and John Quincy Adams, have been so chosen. It is primarily the development of a strong party system which has prevented the necessity of referring the task of choosing the President to the House of Representatives — and the task of choosing the Vice President to the United States Senate. In any event, the President and Vice President are normally chosen by the virtually automatic action of the party slates of electors which are chosen and which meet independently in the several states.

Although there is nothing in the Constitution to prevent the choice of presidential electors by state legislatures, or to prevent their nomination and election without reference to party alignments, most electors since the early years of our history under the Constitution have been nominated on party slates, and voted for by the people at large. Through this process a bare majority of the popular vote within a state determines the selection of one slate of electors. So it is that in theory, at least, a bare majority of the popular votes cast for presidential electors in New York State means that the entire slate of forty-seven electors will cast their electoral votes for the presidential candidate of a single party, in spite of the fact that almost as many individual voters in New York have supported another candidate. The candidate, in other words, receives as many electoral votes from a bare majority as he would get with the unanimous support of all the voters in the state. Since majorities for any presidential candidate, or for his slates of electors, normally vary from state to state, the electoral college system is widely criticized because of the alleged inequities in representation. It is urged that all popular votes ought in proper degree to make themselves felt, and the differences between bare majorities and landslides ought to show in election results.

The system is currently being criticized on still other grounds. As long as electors vote automatically for the nominee of their party, the will of popular majorities, at least, does make itself felt. During 1948, however, as a result of the rift in the Democratic party over civil rights issues, there was widespread discussion of the possibility that Democratic electors would

refuse to vote automatically for the Democratic nominee, and would cast their ballots for another candidate, although in thus exercising their independent judgment the electors would have been acting in terms of the original, rather than the current, conception of the functions of their office. Had this happened, popular control of the election would have been frustrated. One elector in the state of Tennessee preserved his independence by refusing to commit himself on candidates, but in the electoral college he voted for President Truman, in harmony with the sentiments of the majority of the voters in Tennessee. Another elector in the same state ran on the tickets of both the Democratic and the Dixiecrat parties, but declared that he would vote for Governor Thurmond rather than for President Truman. And he did so in spite of the fact that he was flouting the will of the majority.[26] If these deviations from tradition should provide a pattern for more extensive deviations in other presidential elections, they might pave the way for even more obvious flouting of the popular will than is involved in the present system.

The Lodge-Gossett Plan. As a result of dissatisfaction with the operation of the electoral college system and the dread that a presidential election might again be thrown into the House of Representatives, where votes are cast by states and not by individual members, serious proposals are being currently discussed for revamping the electoral system. It is not being seriously proposed that the President and Vice President should be selected through election at large by the voters of the nation in the way governors and United States senators are selected at large by voters within each state. Such an election at large might mean that the support of the successful candidate would be overwhelmingly sectional, and that the interests and desires of substantial areas of the country would be wholly neglected. That is, it might be possible for a relatively few thickly populated states of the East to cast enough ballots to elect a President who had no popularity whatsoever in the West and South. It is deemed best, therefore, to continue to allocate presidential votes in terms of individual states.

One of the most prominent schemes under discussion is known as the Lodge-Gossett plan. This plan would abolish the electoral college, but would continue to allocate electoral votes to the several states. Instead of giving all the electoral votes in each state to the candidate who won a popular majority in that state, it would divide the electoral votes of the state in terms of the popular vote cast for the several candidates. To illustrate, in the 1948 election New York cast some 2,700,000 votes for Truman electors, and some 2,800,000 votes for Dewey electors. Under the present system, the entire 47 electoral votes were counted for Dewey. Under the Lodge-Gossett plan, 21.3 electoral votes would have been allocated to Truman, and 21.8 to Dewey. Under the existing system, President Truman won a national total of 303 electoral votes, while Governor Dewey

26. Arthur Krock, "The One Elector Who Exercised Free Choice," *New York Times*, December 16, 1949.

won only 189. Under the Lodge-Gossett plan, Truman would have received 261.2 electoral votes, and Dewey 222.57.[27]

In 1950 the Senate adopted a resolution proposing such a constitutional amendment, but it was rejected by the House of Representatives. If the plan were adopted, the popular vote would be so correlated with the electoral vote that no candidate receiving the minority of the popular vote would receive a majority of the electoral vote, as happened twice in our history, with the election of Rutherford B. Hayes over Samuel J. Tilden, and the election of Benjamin Harrison over Grover Cleveland. Since the person receiving the largest number of votes would become President — provided that he received forty percent of all votes cast — whether or not he had a majority, there would be less danger of throwing the election into the House of Representatives and of the selection there of a minority candidate, as in the election of John Quincy Adams. Since under the plan people everywhere would be able to make their votes felt, electioneering activities would be carried on all over the country and would not be concentrated, as now, in a few highly populous states where the two major parties are about evenly divided. The electoral vote of the South would no longer be unanimously Democratic, and that of certain northern states would no longer be unanimously Republican. The small states would still retain their present advantage in that they would have electors, not only to match each of their representatives in Congress, but two others to match each of their United States senators. With the electoral college abolished, it would no longer be possible for the manipulators of electoral votes to frustrate the popular will by shifting those votes to a candidate other than the one to whom the popular vote allocated them.[28]

Since no such plan as that proposed by Senator Lodge and others has been put into effect, it is impossible to say what changes it would bring about in voting patterns and how it would affect the balance between the two major parties. In general, majorities in popular votes would not yield the overwhelming majorities in electoral votes which are now sometimes accumulated. Electoral vote totals would instead reflect the actualities of popular divisions. Minority groups in states largely dominated by single political parties might or might not vote in larger numbers in the light of the fact that minority popular votes would be reflected in an accumulation of electoral votes. In view of the present voting patterns of a number of southern states, where for the most part Democrats vote and Republicans do not, it might well be that Democrats, who would continue to cast all southern electoral votes, and would also win some northern electoral votes by virtue of minority voting, would reap special advantage as a result of the change.

27. *New York Times,* November 21, 1949. See Ruth C. Silva, "The Lodge-Gossett Resolution: A Critical Analysis," *American Political Science Review,* vol. XLIV (March, 1950), pp. 86–99.

28. See Henry Cabot Lodge, Jr., *The Electoral "College" vs. The Will of the People,* (pamphlet, United States Government Printing Office, 1948).

Counting Electoral Votes. Under the present system, the electors of President and Vice President meet at designated places in each state on the first Monday after the second Wednesday in December to cast their votes. Certificates of the votes are sent to the President of the United States Senate, to the Secretary of State of each of the respective states, to the Secretary of State of the United States, and to the federal judge of the district in which the electors have assembled.

Congress is directed by statute to be in session on the sixth day of January succeeding each meeting of the electors, and to meet at one o'clock in the afternoon in the Hall of the House of Representatives, with the President of the Senate as the presiding officer. Procedure is prescribed for determining the authenticity of the votes cast by the electors and for counting them. Since the election of 1876, when there was bitter controversy over the recognition of rival slates of electors, the counting of electoral votes has taken place without any important incidents. By this process is settled officially the question of the selection of President and Vice President which to all intents and purposes is ordinarily determined some two months earlier by action at the polls. For the settlement of questions involved in the contested election of 1876, Congress set up an extra-constitutional electoral commission consisting of five senators, five representatives, and five justices of the Supreme Court. The five senators had a majority of one for one party, and the five representatives had a majority of one for the other party. The Supreme Court justices were supposed to be men without bias in such matters. Two of them were definitely Republican in their leanings, however, and two were Democratic. The fifth was a Republican with supposedly some leanings in the opposite direction. From the record it appears that he voted with Democrats on minor matters and with the Republicans when the issue was vital. As a result of the action of the commission, the Republican candidate, Rutherford B. Hayes, became President of the United States, in spite of the fact that he had a somewhat smaller popular vote than the opposing candidate. A federal statute subsequently enacted now seeks to control discretion in such matters, and it is believed that similar difficulties are not likely again to arise.

Determination of Congressional Elections. Although members of Congress are elected by the people, each house is the final judge of the qualifications of its own members. When an election is extremely close, the losing party usually shouts "fraud" and demands an investigation and a recount. Sometimes the seating of a candidate is delayed. On other occasions he is permitted to take the oath of office and begin performance of his duties, but an investigation is undertaken which may last for a period of months or for a year or more, during which time the occupant of the office has an uncomfortable awareness that he may be ousted at any time. In almost every election, the legitimacy of a marginal number of votes is always in doubt, not necessarily because fraud may be involved, but be-

cause of a legitimate doubt whether certain ballots have been properly made out or because procedure has been otherwise defective.

Special Elections. The Constitution makes no provision for a special election of President or Vice President, and no such election has ever been held. The states are authorized, however, to hold interim elections to fill vacancies in Congress. Just as congressional elections in non-presidential election years attract much less attention than in the period of excitement which centers upon the presidential contest, so special elections to Congress attract even less attention than general congressional elections in non-presidential years. They become important to the country at large only when the outcome may cause a shift of political control in Congress, or when special issues are involved in the local contest. An example of special interest was the election of a United States senator in Mississippi in November, 1947, in which candidates differed sharply over the issue of white supremacy, or at any rate over the extent to which white supremacy should be maintained. Another example was the election of a member of the House of Representatives in the Bronx in New York in February, 1948, in which the victorious candidate was a member of the American Labor party who ran under the sponsorship of Henry Wallace, and whose victory was widely regarded as an indication of great strength in the Wallace Third party movement. Other important instances included the election of Franklin D. Roosevelt, Jr., to the House of Representatives in the spring of 1949 as an independent candidate in the face of opposition from Tammany Hall, and the election of Herbert Lehman to the United States Senate in New York in the autumn of 1949 in an election in which a prominent Republican, John Foster Dulles, was the opposing candidate.

APPRAISAL OF THE ELECTORAL PROCESS

Voter Participation. Any appraisal of the democratic exercise of power in the United States through the electoral process must take into account the varied extent of voter participation in the selection of officers. Approximately one-third of the people are excluded from direct participation in elections because of their youth or for some other reason. Of those entitled to participate, large numbers fail to do so even in presidential election years. Extension of voting privileges to women, first by scattered individual states and then through the Nineteenth Amendment by the United States as a whole, brought about great expansion of the potential electorate. Yet the percentage of potential voters who have exercised their voting privilege has declined sweepingly over the past half-century. The following are said to have been the percentages of the total electorate actually casting votes in selected presidential years: 1896, 83 percent; 1916, 72 percent; 1936, 57 percent; 1948, 51 percent.[29] Although any such collection of statistics may reflect a measure of inaccuracy, the figures seem clearly to represent the

29. Compilation by Jennings Randolph, reported by Joseph R. Bryson, *Congressional Record,* March 21, 1949, vol. 95, part 13, p. A1604.

trend away from popular participation in presidential elections. Participation in non-presidential years is normally substantially lighter. Participation varies greatly from state to state and from section to section. In 1948, for instance, figures of participation in Delaware and Utah were respectively 70.9 percent and 74.6 percent, while in Alabama and South Carolina they were respectively 13.74 percent and 13.85 percent.[30]

There is no way of explaining accurately why potential voters fail to exercise their franchise. We do know, it is true, that some Negroes in the South and in other parts of the country, and some other minority racial groups in various sections, refrain from voting because of intimidation, or because at least of the surrounding atmosphere of disapproval. We suspect that a sense of futility keeps minority voters away from the polls in sections where the victory of a majority party is a foregone conclusion. We suspect that many people refrain from participation because their principles are reflected in the platforms and the practices of neither major political party. We suspect that voters who participate irregularly withdraw from time to time for lack of interest in all the nominees on a given occasion. We know that weather conditions, the demands of business, individual health, ignorance, and other factors, act always to keep some people away from the polls. Even so, however, the motivation of non-voters is anything but adequately explained. Perhaps it can be understood only as we learn more about the basic motivations of the people who do participate in elections. We know only in a general way that people vote because of loyalty to a party, or to a candidate, or because of their political principles, or because they fear the victory of the opposition, or because they are urged to do so by party officers of personal friends, or because participation is the custom of their class of people in their particular community. Motives and their values differ, however, from individual to individual, from group to group, and from community to community. We actually know very little about what makes our political machinery operate as it does.

Compulsory Voting. Speakers about our political system widely assume that since the system is a representative democracy, the quality of its performance is likely to vary with the participation of the voters. In addition to arguing on behalf of wider voter participation, and in discussing the various techniques now in use for getting out the vote, some critics argue for adoption of a scheme for compulsory voting, or at any rate for placing penalties on non-voting. Attention is called to such facts as that in Australia, where prior to 1925 less than 50 percent of the electorate habitually turned out for federal elections, the turnout since the adoption of a compulsory-voting statute has usually been somewhere between 95 and 99 percent. The turnout in Belgium has increased from approximately 10 percent to over 90 percent.[31] Various other countries, including both democ-

30. Figures compiled by Senator Owen Brewster, *Congressional Record,* April 8, 1949, vol. 95, part 13, pp. A2102–2103.

31. Robert Cobb Myers, "A Proposal to Tax Those Who Don't Vote," *New York Times Magazine,* November 6, 1949, p. 12.

racies and dictatorships, have utilized compulsion to secure action by the people at the polls. Although compulsory voting has been discussed in a number of states and was authorized by the constitutions of North Dakota and Massachusetts, no American state exercises it. An ordinance of Kansas City, Missouri, moved in that direction in 1889 by exempting actual voters from a poll tax of $2.50, thereby penalizing non-voters to that extent. After seven years of operation, the statute was declared unconstitutional by the state Supreme Court on the peculiar ground that it infringed the "sovereign rights of suffrage." [32]

Compulsory voting is objected to on many grounds. It is said, for example, that compulsion is in essence a violation of the right of free participation in government which democracy implies. It is argued that in terms of democratic theory men have the right to be essentially non-political as well as the right to participate in government.[33] It is said that democratic government would be hindered more than helped by herding to the polls large numbers of uninterested and uninformed persons. Involuntary voting, it is contended, would destroy interest in the elective process instead of promoting it. The argument in terms of democracy disregards the fact that democracy habitually utilizes compulsion to secure payment of taxes, military service, and school attendance. It is at least a possibility that instead of drowning intelligent political action in the mass action of unintelligent and uninformed people, compulsory voting would stimulate interest and the development of education in political matters.[34] Admittedly, it would drastically modify politics in those states in which voter participation is always light. Existing political machines might well be wrecked in the process of digesting the gigantic stream of new voters. It is by no means assured, however, that these results would be predominantly evil.

However that may be, the weight of doubt and the weight of outright opposition are likely to hinder any rapid movement toward compulsion. Since it is doubtful whether a federal compulsory statute could be justified by the constitutional grant of power to Congress to regulate the "manner" of conducting elections, it might well be that a constitutional amendment would be necessary to the adoption of a national system of compulsory voting. Presumably such a system could be adopted and administered by the individual states, but entrenched political interests are likely to render such action difficult or impossible.

The Continuing Place of Political Parties. In spite of the steady expansion of state and federal regulations of party activity, the dynamics of the electoral process continue to flow from political parties. Parties, for all the regulations to which they are subjected, are agencies operating from outside government rather than from within it. While the present situation has its illogical elements, neither the political experts nor citizens at large agree whether the government should take over the parties, the parties

32. *Ibid.*, p. 79.
33. See Thomas I. Cook, "Democracy, Leisure, and Communism," *Journal of Politics*, vol. XII (August, 1950), pp. 530–46.
34. Robert Cobb Myers, *op. cit.*

should take over the government. or the status quo should be maintained. As already intimated, something can be said for each of the three possibilities. As to the last-named, it can be said in recapitulation that the party is a necessary intermediary between the individual with his own complex of desires and interests and the government wherein action is supposed to represent, not the desires or interests of particular individuals or particular groups, but rather a distillation of the common interests of many groups and of a majority of the people. Merging the political party and the government, or the government and the political party, would mark failure to recognize the unique, the primary, and the essential function of the political party in relating individual and group ideas, aspirations, and desires to the operations of the government.

References

Herbert Agar, *The People's Choice from Washington to Harding* (Houghton Mifflin, 1933).

Louis H. Bean, *Ballot Behavior, a Study of Presidential Elections* (American Council of Public Affairs, 1940).

———, *How to Predict Elections* (Knopf, 1948).

Edward S. Corwin, *The President: Office and Powers; 1789–1948* (New York University Press, 1948).

Morris L. Ernst and David Loth, *The People Know Best* (Public Affairs Press, 1949).

Cortez A. M. Ewing, *Congressional Elections: 1896–1944* (University of Oklahoma Press, 1947).

———, *Presidential Elections* (University of Oklahoma Press, 1950).

The Gallup Political Almanac for 1948 (American Institute of Public Opinion, 1948).

Joseph P. Harris, *Election Administration in the United States* (Brookings Institution, 1934).

———, *Registration of Voters in the United States*, Brookings Institution, 1929).

Paul F. Lazarsfeld, Bernard Berelson and Hazel Gaudet, *The People's Choice* (Columbia University Press, 2nd ed., 1948).

Dudley O. McGovney, *The American Suffrage Medley* (University of Chicago Press, 1949).

Norman C. Meier and Harold W. Saunders (eds.), *The Polls and Public Opinion* (Holt, 1949).

George F. Miller, *Absentee Voters and Suffrage Laws* (Daylion Co., 1948).

Frederick Mosteller et al., *The Pre-Election Polls of 1948* (Social Science Research Council, 1949).

George E. Mowry, *Theodore Roosevelt and the Progressive Movement* (University of Wisconsin Press, 1946).

Roy V. Peel and Thomas C. Donnelly, *The 1928 Campaign* (R. R. Smith, 1931).

———, *The 1932 Campaign* (Farrar and Rinehart, 1932).

James K. Pollock, *Party Campaign Funds* (Knopf, 1926).

Louise Overacker, *Money in Elections* (Macmillan, 1932).

———, *Presidential Campaign Funds* (Boston University Press, 1946).

Edgar E. Robinson, *The Presidential Vote 1896–1932* (Stanford University Press, 1934).

———, *The Presidential Vote, 1936* (Stanford University Press, 1940).

———, *They Voted for Roosevelt* (Stanford University Press, 1947).

Lindsay Rogers, *The Pollsters* (Knopf, 1949).

Charles W. Stein, *The Third Term Tradition* (Columbia University Press, 1943).

PART TWO ★ *Federal Legislation*

9

The Body of Federal Law

The subject of politics, which has been followed closely in the three preceding chapters, is of course not limited to activities which end in elections. It permeates the activities of Congress, of the President and the executive and administrative establishment, and to a degree it reaches even into the judiciary. It would be possible, in short, to maintain politics as the dominant theme throughout the study of almost all the institutions and activities of the federal government. To keep the emphasis upon politics, however, would result in under-emphasis upon other phenomena which are no less important. Politics is concerned primarily with the way in which individual and group desires and interests are compromised and harmonized to make government action possible. Much of it, as already illustrated, takes place at pregovernmental stages, but political processes must continue among the people and among governmental employees throughout the stages of governmental activity as well. In close relation to politics, however, are the processes of law and the processes of administration. Administration is concerned with the art and the science of getting things done. Although it too permeates all aspects of government and to some extent the pre-governmental political phases of politics, it will be discussed hereafter primarily in connection with our study of the executive branch of the government. The subject of our immediate interest is law, which will be discussed first in connection with the study of the legislative branch of the government and later in connection with the law-making activities of the executive and of the judiciary.

As a preliminary to discussion of federal statute law [1] and federal legislative processes, the reason for the order of the following three sections dealing with legislative, executive, and judicial subject matter should be noted. It is the conventional order of treatment which the first three articles of the Constitution provide. A number of books on our national government published in recent years have changed the order of treatment. After a background discussion of political parties they have moved to a treatment of the presidency, portraying the President as the leader of his political party and as party leader exercising strong influence over Congress.

1. For discussion of other kinds of law than statute law, see Chapters 18 and 21.

These books have discussed Congress after rather than before the presidency. There is some justification for this order if the emphasis upon politics is to be maintained, and it may be justified to some extent also in terms of the growing power of the President with respect even to legislative matters.

In this book, however, the legislative branch will be treated first, not only because this is the order of the Constitution but also because it properly emphasizes the importance of the existing body of federal statute law as the controlling factor in our society. That voluminous body of law is enormously important in determining and shaping the activities of the federal government and the conduct of the people. It is an accumulation of those statutes enacted through more than one hundred sixty years which have not been repealed or superseded or have not expired of their own force. Parts of it are being changed from time to time by succeeding Congresses, but in most aspects the basic pattern remains in spite of the changes. To put the matter differently, Congress does not reassemble each year to repeal all statutes previously enacted and replace them with new ones. It assumes that the main body of law will continue in force as parts of it have done for many years or many decades. It modifies trends here and there, expands the exercise of power at one point and contracts it at another, modifies procedure where it has seemed to work badly, and in other ways operates in recognition of the fact that it is not recasting our whole body of federal statute law but merely modifying it in terms of current needs and desires. It is almost impossible to conceive the predicament in which Congress would find itself if in some fashion the existing body of federal law were eliminated without texts to use for re-enactment. Re-thinking our legislative needs all the way from the Constitution as the basis for legislation down to enactment of a new body of law with substantially the same coverage as the present body would be a task of gigantic proportions. It is one that does not have to be undertaken because the present body is there, because existing federal statutes already prescribe in vast measure the scope of operations and the methods of operations of the federal government. In other words, in spite of the drastic character of the legislative changes made in recent years, the country is governed primarily not by completely new measures but by measures enacted over more than one hundred and sixty years according to legislative patterns which have become well established during that time.

THE MECHANICS OF COMPILING STATUTES

United States Statutes at Large. The laws enacted by Congress — or the statutes, as they are now usually called — are at first printed individually in pamphlet form as what are called "slip laws." They are first made generally available, however, when they are published by the United States Government Printing Office under the title of *United States Statutes at Large*. In recent years, when the quantity of new legislation has been

great, two volumes of statutes have been issued each year — although the two together are listed as one volume and are merely distinguished as Part I and Part II. The 1949 congressional output of statutes is listed as Volume 63. While bulk is not too significant as a measure of quantity, something is suggested by the fact that the entire set of books, which includes treaties, proclamations, and other documents as well as statutes, occupies more than twenty-three feet of shelf space.

The statutes are printed chronologically rather than arranged by subject, except that Part I of current volumes includes what are called public laws and certain other documents having to do with the organization of government and the relations of government to the people generally, whereas private laws, having to do usually with benefits to particular individuals or groups, and treaties and other documents, are printed in Part II.

It is with public laws, prescribing the organization and operation of the federal government, that we are most concerned. Within the compilation of the public laws of the past hundred and sixty years, however, are included appropriation bills, tax measures, acts for admission of states to the Union, acts for clearing rivers and harbors, military measures, statutes dealing with a great variety of other subjects, and innumerable other measures which have been repealed or modified by other statutes. Searching for the living law in the *Statutes at Large*, therefore, is likely to be a search through largely irrelevant and currently useless materials. Because of this fact Congress has found it necessary from time to time to extract the laws still in force from the *Statutes at Large* and to publish them separately.

Codification of Federal Statute Law. The first official codification of federal statute law, completed in 1874 under the name of *Revised Statutes*, brought together all public laws then in force and included more precise drafting of some of the provisions. A new edition was brought out in 1878, and supplements were added from time to time to include new statutes and modifications of old ones. Inevitably, the aggregation of new materials eventually made the *Revised Statutes* largely unusable. The next official compilation was the *United States Code*, which bore the date of 1925 and was adopted by Congress in 1926. This work, too, was presented as a compilation of all the federal statute laws then in force. Supplemental volumes were published to include newly enacted statutes. An entirely new Code was issued as of 1934, another as of 1940, and still another as of 1946.[2] By contrast with the twenty-three feet of shelf space occupied by the *Statutes at Large*, the 1946 *Code*, with its four volumes of text and one volume of index, and without the supplements issued for later years, occupies approximately twelve inches of shelf space.

Arrangement Within the United States Code. The *United States Code*[3]

2. For discussion of codification measures taken down to the date of the publication, see the *Congressional Record*, February 27, 1931, vol. 74, part 6, pp. 6312–21. See also the Preface to the most recent edition of the Code.

3. *The United States Code*, published by the Government Printing Office, is also

was not arranged for the benefit of students of government or theorists about government or law. It was not devised to show the immense amount of inter-relation among highly diverse parts of our statute law. It was intended, largely for the benefit of lawyers and government officials, to group together within small compass the statutes and parts of statutes now in force, under a group of easily comprehensible headings. These headings are called Titles, and the Titles are divided into Sections. Code provisions are cited by Title and Section numbers. Title 15, for example, deals with Commerce and Trade; within that Title, Section 1002 deals with the charging of tolls on the Golden Gate Bridge at San Francisco. The provision is cited as Title 15, Sec. 1002.[4] Within Title 16, which deals with Conservation, is the text of a statute by which the Tennessee Valley Authority was established. The initial paragraph of the statute is cited as Title 16, Sec. 831.

There are fifty Titles in the Code.[5] From the point of view of showing the integration of the whole body of statute law, their arrangement leaves much to be desired. The first six Titles, it is true, dealing with Congress, the President, the executive departments, and related matters, suggest integration of part of the subject matter, but thereafter the original compiler turned to the alphabet. Title 7 deals with Agriculture and Title 50 deals with War. Agriculture is followed not by Conservation or Public Lands or Commerce, to which it might be related, but by Aliens and Citizenship. Title 22, Foreign Relations, is preceded by Food and Drugs and followed by Highways. Title 28, Judicial Code and Judiciary, which deals with the operations of the federal courts, is preceded by Intoxicating Liquors and followed by Labor. The alphabetical arrangement was adopted apparently because the relations of letters of the alphabet were deemed more

published commercially as the *United States Code Annotated* and the *Federal Code Annotated*. These commercially published editions use the same arrangements of statute materials but add interpretations from judicial decisions based thereon.

4. Each section of the Code which has been derived from a statute also cites the statute and the date of its enactment. The citation in this instance, for example, is March 14, 1944, c. 92, Sec. 1, 58 Stat. 116.

5. The Titles are as follows: Title 1. — General Provisions; Title 2. — The Congress; Title 3. — The President; Title 4. — Flag and Seal, Seat of Government, and the States; Title 5. — Executive Departments and Government Officers and Employees; Title 6. — Official and Penal Bonds; Title 7. — Agriculture; Title 8. — Aliens and Citizenship; Title 9. — Arbitration; Title 10. — Army; Title 11. — Bankruptcy; Title 12. — Banks and Banking; Title 13. — Census; Title 14. — Coast Guard; Title 15. — Commerce and Trade; Title 16. — Conservation; Title 17. — Copyrights; Title 18. — Criminal Code and Criminal Procedure; Title 19. — Customs Duties; Title 20. — Education; Title 21. — Food and Drugs; Title 22. — Foreign Relations and Intercourse; Title 23. — Highways; Title 24. — Hospitals, Asylums, and Cemeteries; Title 25. — Indians; Title 26. — Internal Revenue; Title 27. — Intoxicating Liquors; Title 28. — Judicial Code and Judiciary; Title 29. — Labor; Title 30. — Mineral Lands and Mining; Title 31. — Money and Finance; Title 32. — National Guard; Title 33. — Navigation and Navigable Waters; Title 34. — Navy; Title 35. — Patents; Title 36. — Patriotic Societies and Observances; Title 37. — Pay and Allowances (Army, Navy, Marine Corps, Coast Guard and Geodetic Survey, and Public Health Service); Title 38. — Pensions, Bonuses, and Veterans' Relief; Title 39. — The Postal Service; Title 40. — Public Buildings, Property, and Works; Title 41. — Public Contracts; Title 42. — The Public Health; Title 43. — Public Lands; Title 44. — Public Printing and Documents; Title 45. — Railroads; Title 46. — Shipping; Title 47. — Telegraphs, Telephones, and Radiotelegraphs; Title 48. — Territories and Insular Possessions; Title 49. — Transportation; Title 50. — War.

obvious to people using the code than the actual relations of subject matter. So it is that the existing body of federal law, although brought together within brief compass, is, as far as the Titles go, related only by the relations of the alphabet.

Within each of the fifty titles, however, there is a measure of unity. Most of the Internal Revenue materials are brought together within Title 26, which bears that name. Most of the materials dealing with Banks and Banking are in Title 12, even though they are separated from Money and Finance in Title 31. Most of the materials dealing with Customs Duties are in Title 19. Within each Title the material incorporated is arranged partly in terms of the dates of enactment of the statutes included, although amending provisions from later dates are worked into the text at the relevant points and obsolete provisions are deleted. Furthermore, the statutes originally incorporated in each of nine of the fifty Titles have been rewritten and consolidated as Title units, so that each of these nine Titles constitutes a miniature code within the *United States Code* as a whole.[6]

THE INTERRELATIONS OF STATUTES

Jurisdictions and Patterns of Action. It is extremely doubtful whether any newly elected congressman ever sat down with a copy of the *United States Code*, analyzed it as a whole, and made systematic plans for its improvement. He is likely to have been elected on the basis of promises to seek particular reforms desired by his constituents, such as lower taxes, more or less aid to Europe, more or less expenditure on irrigation projects, and so on. He is likely to give much thought to individual projects and little or no thought to the body of statute law in its entirety. Inevitably, however, his success with individual projects is measured in part by the adequacy with which they are related to other statutes. No statute ever stands completely alone. Almost every such measure ties in specifically with others in some respect, and in any event it is drafted and proposed for enactment in such a way as to correspond with the general pattern of statute law in its field. Even a simple measure involving the construction of a bridge across a navigable stream must be fitted into a complicated pattern of measures previously enacted. Relevant to it, for example, are the provisions in Title 33, Navigation and Navigable Waters, which deal with "Protection of Navigable Waters and of Harbor and River Improvements Generally." Interstate commerce on the stream being bridged must not be obstructed — or if in this instance its obstruction is authorized, Congress needs to be aware of the extent to which by an individual change it is modifying general policy. If the bridge leads traffic from one state to another it becomes a highway over which the Interstate Commerce Act provides for regulation of interstate motor vehicles which are common carriers. If it is to carry a gas line along one side, another statute gives regulatory jurisdiction to the Federal Power Commission. If the federal govern-

6. The numbers of the codified Titles are 1, 3, 4, 6, 9, 17, 18, 26, and 28.

ment lets a contract for construction of the bridge, existing legislation on the matter of letting contracts becomes applicable. The Budget and Accounting Act gives the Comptroller General of the United States jurisdiction to check on all expenditures. Procedures under this act, to follow a single line of development, bring into play the activities of Civil Service employees who operate under Civil Service legislation, who are classified and paid as statutes provide, who have retirement privileges under other measures, and so on. All these and many more entanglements arise because Congress has decided to build a bridge.

The Statutory Pattern of Labor Legislation. The formal and informal relations of new statutes to old ones are hard to separate. Another illustration can be provided from the field of labor legislation, with the National Labor Relations Act of 1935 at the center of discussion. In planning that statute Congress was concerned with guaranteeing to most workers in any way connected with interstate commerce the right to unionization and the right of collective bargaining through unions with employers. It had to state the rights being conferred and provide machinery for administration and enforcement of its provisions. Some of the interrelations with other statutes may be indicated as follows.

As its principal administrative agency to guarantee the right of collective bargaining, Congress provided for establishment of the National Labor Relations Board. The new Board was patterned somewhat after one previously established under the National Industrial Recovery Act. Taken into account also were earlier boards established by the president in the exercise of emergency powers and the National Mediation Board, an agency which had been set up to meet the needs of workers under the Railway Labor Act of 1926. Furthermore, in planning the establishment of new boards which served in the pattern of what are called independent regulatory commissions, Congress habitually looks to the commissions established under the Interstate Commerce Act, the Federal Trade Commission Act, and other measures. In other words, the experience of government operating under other statutes has a guiding effect in the shaping of new ones.

The National Labor Relations Act authorized the board to appoint employees without regard for the provisions of Civil Service laws, but made such appointments subject to the Classification Act of 1923. The board was forbidden to appoint personnel for the exercise of certain functions which by other statutes were allocated to the Department of Labor. The compensation of workers and expense accounts for travel and other purposes were to be paid through the complicated procedure prescribed in other statutes for the expenditure of government funds.

In forbidding employers to engage in "unfair labor practices" the framers of the statute took into account language previously used in the National Industrial Recovery Act and various other measures, and experience in connection therewith. The drafting of procedure for the prevention of unfair

labor practices undoubtedly took into account previous experiences under the Federal Trade Commission Act with the outlawing and prevention of unfair trade practices. For enforcement of the statute, the board was authorized to call on United States circuit courts of appeals, as with a number of other statutes which give administrative agencies access to the courts. These provisions bring into the picture the network of statutes which have been reworked into what is called the Judicial Code, and which prescribe the organization and operation of the courts of the United States. In giving courts power to issue injunctions in connection with enforcement of the statutes, Congress explicitly made exception to the Norris-LaGuardia Act of 1932, which to protect labor, forbade injunctions secured by employers. Congress also explicitly provided that the provisions of this statute should stand whenever they were found to be in conflict with the National Industrial Recovery Act and the National Bankruptcy Act.

This illustration of the relation of new statutes to old ones is typical of most new statutes, whether or not the language of the new statute shows awareness of the interrelations. The sponsors of individual new statutes, of course, may be partly unaware of and unconcerned about these relations. Because of this lack of concern on the part of sponsors, and because of the confusion sometimes inadvertently created when new statutes clash in part with old ones without specifying which is to be effective under certain circumstances, congressional committees are expected to scrutinize language carefully and to rely upon their bill-drafting experts to cope with problems of conflict and confusion. Even so, conflicting or confusing issues often have to be taken to the courts for solution because Congress has failed in particular instances to define adequately the interrelations of new statutes with old ones.

The purpose of this discussion of the interrelatedness of statutes, to which individual congressmen often give too little attention, is not to criticize the negligent congressmen, but rather to demonstrate to the student of American government how extremely complex are the interconnections among the statutes which make up the *United States Code.* Not all statutes, of course, have close relations one with another. There is not, for example, much relation between an act authorizing construction of a bridge in Arkansas, an act prohibiting the marketing of diseased meat, one providing financial aid to Western Europe, and another providing for the payment of salaries of postal employees. Even these diverse items, however, fit into a picture which is a kind of organic whole and not merely a collection of isolated items thrown together.

BASIC PATTERNS IN FEDERAL STATUTE LAW

The Constitutional Base. All valid federal statutes derive their power ultimately from the Constitution. Article I of the Constitution vests in Congress "all legislative power herein granted." A considerable number of specific legislative powers granted to Congress are enumerated in Sec-

tion 8 of Article I. Among them are included the power to raise money, whether by taxation or borrowing; the power to spend the money subject to certain limitations; and the power to coin money and regulate its value, and to punish counterfeiting. Enumerated also are the power to legislate on the subject of bankruptcy, the postal power, the power to provide for copyrights and patents, and the various powers connected with the maintenance of military and naval forces and the waging of war. Finally, the Section greatly broadens the scope of congressional authorization by conferring the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." On this provision, frequently called the "necessary and proper clause," are based many statutes which it would be hard to justify in terms of specific grants of power in the Constitution. One of the best examples is provided by the decision of the Supreme Court in McCulloch *v.* Maryland [7] in which Chief Justice Marshall discussed broadly the implications of the "necessary and proper clause." The basic question was whether the Constitution authorized Congress to establish a national bank. The Constitution does not in so many words even mention banks or banking. It does not specifically mention corporations of any kind or authorize Congress to create them. Yet it does give the power to coin money and regulate its value, to regulate the currency, to levy and collect taxes, to borrow money, to regulate commerce, to provide for an army and navy, to wage war, and to exercise other functions which might well be facilitated by the use of a national bank established and supervised by the federal government. In the light of this fact, the Supreme Court held that Congress had the power to charter a bank even though the subject was not specifically mentioned in the Constitution. By similar reasoning, broad extension of federal legislative power along many other lines has taken place largely without reference to specific language in the Constitution.

Because some powers enumerated in the Constitution have been the sources of very little legislation whereas others have given rise to legislation in great volume, and because some statutes can be related to any enumerated power only with difficulty, the outlines of the Constitution itself and the list of enumerated powers are of only limited value in the search for patterns in the structure in our body of statute law. As already indicated, even the list of fifty Titles of the *United States Code* is inadequate, since the Titles are for the most part arranged alphabetically rather than in terms of their substantive relations. Such patterns as are to be found must therefore be inferred from the contents of the Constitution and of the several Titles of the *United States Code*, and not merely from specific provisions and outlines.

Topical Outline. A topical outline of the subjects covered by the *United States Code*, drawn in part from the Constitution and in part from a re-

7. 4 Wheaton 316.

arrangement of the Titles of the code in terms of the relation of subject matter, might be arranged with the following major headings: The Machinery of Government; Problems of Finance; Military Power; The Regulation of Commerce; Natural Resources; Federal Aid to State Programs; and Foreign Relations. Although such a list of topics leaves a great deal unmentioned — or leaves it to be crowded with varying degrees of difficulty under subheadings only moderately relevant — it does indicate in terms of bulk the classification of the important sections of the federal statutes. Each of these headings needs to be studied at some length.

THE MACHINERY OF GOVERNMENT

Congress. It is only natural that before drifting into an alphabetical arrangement of Titles, the formulators of the *United States Code* selected the early Titles in terms of the organization and establishment of the machinery of government itself and of basic procedures connected therewith. Without a federal government, obviously, there can be no federal statute law, and no administration or enforcement of such law. Getting the government itself under way was the primary task of the First Congress. Within that field, part of the responsibility of Congress is to provide for its own operation. It legislates concerning elections at which its members are chosen, it determines the size of the House of Representatives, it provides for the taking of a census of population every ten years, and for the allocation of representatives among the several states in terms of population totals. Congress provides for the compensation of its members and for its own meeting place, and it appropriates the necessary funds to cover the expenses of its varied operations. It decides for itself what aids it needs, such as those provided by the Library of Congress, the Legislative Reference Service, the Office of Legislative Counsel, and so on.

The President. Although the office of President, like Congress itself, is provided for directly by the Constitution, the effective operation of the office requires the support of a great deal of federal legislation. It is Congress and not the President which prescribes the operations of the electoral college and the methods of identifying and counting legitimate electoral votes. It is Congress which legislates on the subject of succession to the presidency if there is no President or Vice President. Congress prescribes the salary of the President, the expense funds to which he shall be entitled, the housing to be provided for him, the protection which he shall receive, and the amount, character, and organization of the assistance to which he shall be entitled. Although decisions in these matters do not remain fixed indefinitely when they have been made, but vary with time and circumstances, patterns of regulation get established and the variety of possibilities becomes limited by habit and the aura of sanctity which attaches to past ways of behavior.

The Executive Departments. Since the Constitution makes only limited mention of the executive departments, the pattern of their organization was left almost entirely to Congress. The First Congress created and prescribed the organization of three departments, those of State, War, and the Treasury, and established the office of the Attorney General which some three-quarters of a century later was reorganized as the Department of Justice. The Post Office and Navy Departments were also established before the end of the century. In providing for those early departments, Congress in large part grooved the pattern according to which the constant growth of the subject matter of executive supervision and control has been organized. It was in terms of this pattern that the other departments, of Interior, Agriculture, Commerce, and Labor were brought into existence with the growth of the country in area and population, and with the growth of the responsibilities of the federal government as fundamental changes took place in the national economy. Congress could, if it so desired, abandon the pattern of departmentalization. It could replace all the departments with organizations fundamentally different in character. In actuality, although the activities of particular departments are constantly subject to legislative change, the weight of tradition determines that all departments continue to function after the established pattern, and that as new ones are created they are fitted as a matter of course into the old scheme. Whether for better or for worse, therefore, the provisions and the implications of the *United States Code* continue to govern.

Experimentation, it is true, takes place side by side with the observance of established rituals. For example, in the act to regulate commerce which was passed in 1887, Congress provided for a new type of device in the federal government for the regulation of railroads. It was called an independent regulatory commission with the name Interstate Commerce Commission, which in some respects merged the characteristics of legislative, executive, and judicial agencies. The device worked so well in the field of railroad regulation that it was followed in 1914 by the establishment of the Federal Trade Commission for the prevention of unfair trade practices generally in interstate commerce. Thereafter it was expanded into broader use, establishing in the *United States Code* and in the government a pattern of behavior somewhat differing from, and operating alongside, the pattern of departmentalization. Here again the establishment of a pattern in the *United States Code* has exercised to some extent a controlling behavior over the enactment of new statutes to operate in related situations. Various other devices and arrangements, as will be illustrated further along, have been tried experimentally by virtue of an initial statute, and initial statutes have provided bases for utilization of similar devices as the result of other statutes subsequently enacted. The merit system which we have characterized somewhat loosely as our civil service system and which has operated under the supervision of the Civil Service Commission, got established and ritualized in a particular way so that making fundamental

changes in it has seemed almost as difficult as making changes in the Constitution itself.

The Judiciary. The judicial branch of the government, although provided for in Article III of the Constitution, is in large part the creature of Congress. The Constitution provides specifically for the establishment of the Supreme Court, but to Congress is left determination of the number of members, the time and place of meeting, the compensation of the Justices, and the area of much of its jurisdiction. The Constitution makes no reference to the organization of lower federal courts except in providing that there shall be "such inferior courts as the Congress may from time to time ordain and establish." We must therefore go to the *United States Code* for both the outlines and the details of the organization of the United States circuit courts of appeals, the United States district courts, and other judicial agencies. Although the subject has called for renewed legislation from time to time, and on occasion for fairly drastic changes, the basic pattern as reflected in the *United States Code* still bears a considerable resemblance to the pattern established by the Judiciary Act of 1789.

Title 28 of the *United States Code*, which deals with the federal judiciary, was originally like most of the other Titles of the code in that it was a compilation of the sections of the many statutes enacted by Congress from time to time and still in effect setting forth the organization, jurisdiction, and operations of the federal courts. Congress has modified its code procedure with respect to this Title, however, by rewriting more compactly the many statutory provisions governing the federal courts, and by adopting the entire Title as if it were a single statute. This Title, therefore, which within itself is called the Judicial Code, represents a well-integrated body of subject matter, and is therefore a code in a more genuine sense than is the *United States Code* as a whole, since the latter constitutes a collection of statutes and excerpts from statutes rather than an integrated statement of the law as a whole. Among the eight other Titles in the *United States Code* which have been similarly worked into an integrated whole is Title 18, the Criminal Code, which is related to the Judicial Code in that it describes in detail the criminal procedure to be followed in the federal courts in addition to the body of criminal law which Congress has enacted.

Enough has been said to illustrate the way in which patterns of governmental organization and activity have been established in the *United States Code* where they have a lasting influence, even though theoretically Congress could at a moment's notice abandon the entire pattern except as it is fixed in the Constitution itself. Further illustrations could be given in connection with such matters as the postal service, the construction of public buildings, the care of public property, the operation of public works, the handling of contracts made by the federal government, the control of immigration, the conferring of citizenship, and so on. The purpose here, however, is not to enumerate completely but rather to show by illustration

the nature and extent of the control exercised by the body of existing statute law over our governmental institutions.

PROBLEMS OF FINANCE

Revenue. Although all subjects of legislation have some relation to operations of the government as a government, some legislative fields are sufficiently specialized to justify separate classifications. One of those fields has to do with problems of finance. One of the most important tasks of the First Congress was to devise ways of raising revenue for the support of the government. In general language, the Constitution gave Congress the power to lay and collect taxes, duties, and imposts, and the power to borrow money. It placed certain limitations on the taxing power but it did not indicate any priority of sources from which taxes were to be collected or prescribe methods of collection. The early decisions of Congress to use imports as a source of revenue and also to levy excise taxes, as illustrated by the tax on the manufacture of whiskey, gave indication of the patterns likely to be followed. The subsequent raising of the level of tariff duties and the expansion of excise taxes followed the pattern previously established. Certain fundamental changes, it is true, have taken place in our scheme of raising revenue and have themselves become well entrenched in our *United States Code.* The major source of federal income today is income taxation rather than excise taxes or tariff duties, and the utilization of income taxation has become so much a part of our practice that its abandonment, while theoretically possible at any time, is almost inconceivable.

Borrowing. The government, like individuals, can temporarily meet its financial needs by borrowing. The Constitution gives Congress the power to borrow money on the credit of the United States, and although the borrowing is done through the Treasury Department, congressional authorization is necessary. Congress determines the top limit of the national debt. It determines the amount of taxation and the amount of appropriations, and therefore determines the amount that ought to be borrowed. Through the decisions thus involved, it determines many of the factors which give rise to inflation on the one hand, or deflation on the other. The questions of policy are therefore enormously sensitive ones, involving as they do the economic welfare of the people and the political welfare of their representatives in Congress.

Spending. The Constitution provides in Article I, Section 9, that

> No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement of receipts and expenditures of all public money shall be published from time to time.

A great deal of the power of Congress, indeed, is derived from what is commonly called "control of the purse." Congressional patterns of spending

as well as patterns of taxation tend to shape the course of future action in the same field. In spending as in taxation, it is true, patterns undergo changes. Under the theory generally accepted at the time of the adoption of the Constitution, taxes were to be kept as low as possible, and spending was to be limited to the necessary operations of government. In terms of modern theories which are now well entrenched in the *United States Code*, taxation is utilized in some measure to equalize incomes, and spending has become a device both of sharing the riches of the country with all the people and of regulating the operations of the economic system.

Money and Banking. The Constitution gives Congress the power to coin money and regulate its value. Such regulation has followed a shifting pattern, with the advocates of gold and silver competing for establishment of their respective metals as the basis of monetary value. In the changing economic situation of the 1930's, the country moved in the direction of what is called a "managed currency," which bears only an indirect relation to reserves of gold. In this field past methods of behavior and the new techniques of management compete constantly for the control of new legislation. Congress exercises power over paper currency as an implied or resulting power from other powers specifically given in the Constitution. Its power over banks and banking derives similarly from a variety of sources. The scheme of banking operations under the control of the Federal Reserve System is now so well entrenched that new measures enacted on the subject must take into account generally the continued operations of the present system.

Bankruptcy. At the somber end of the financial and monetary scale is the responsibility of the federal government for the liquidation of financial disasters. The Constitution gives Congress power to pass uniform laws on bankruptcy, but the federal government became a large-scale operator in this field only with the enactment of the Bankruptcy Act of 1898. Under that statute, with subsequent amendments, Congress has established a pattern of action which plays an important part in our business economy.

MILITARY PROBLEMS

Basic Powers. Adequate provision for national defense, and for the waging of any war which may be necessary, is another of the basic responsibilities of Congress. Congress is authorized to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, to suppress insurrections, to repel invasions, to declare war, and to exercise other specified powers which are military in character. During the first decade under the Constitution, Congress established a pattern of separating jurisdiction over the Army from that over the Navy by giving control of the Army to the War Department and of the Navy to the Navy Department. That separation was

thereby so firmly established that, in spite of the strategic and financial necessity in current times of operating all the armed forces as a single military establishment, it is proving next to impossible to bring about the necessary integration. The separation of the War and Navy Departments, in other words, and of the Army and the Navy, illustrates superbly the continuing effect of congressionally established patterns.

Deeply rooted in the thinking of the American people over most of our history has been the assumption that the military must never be permitted to be paramount over civil jurisdiction. For those who believe in the civil supremacy over the military, the slowness with which patterns of action can be changed is a matter of comfort. No change is impossible, however, given enough time and enough argument for its support. It is conceivable that involvement in successive wars and continued periods of operation virtually as a national armed camp may change the popular conception and the underlying principle of legislation with respect to the exercise of military power.

The Waging of War. While in part incorporating principles and practices which have been internationally followed in the waging of war, Congress has found it necessary to enact so-called articles of war governing the conduct of United States forces. This body of law, now revised as a Uniform Code of Military Justice, likewise reveals the operation of continuing principles and practices and at the same time the innovation of new ideas in terms of changed circumstances and changed conceptions of justice. Procedures in courts martial, for example, which were once deemed satisfactory, have had to give way during or following each major war in which the United States has been engaged because of dissatisfaction with their arbitrary character.

In time of threatened or actual war, the legislation enacted by Congress is extremely varied and is in no sense limited to technically military matters. National resources must be channeled into war-time production. Personnel must be provided in one way or another not only in military forces but for the forces of production and distribution as well. The civilian population must be kept supplied with necessities and protected against exorbitant prices, but deprived at the same time of commodities and services which are needed for the conduct of the war or which can be dispensed with altogether. Governmental machinery of borrowing and spending, of letting contracts for and purchasing large quantities of materials for war purposes, must be activated. Provisions must be made for vigilance against enemy attack or disintegrating activities internally as well in formal military relations with the enemy. Executive agencies have to be built up into instrumentalities of tremendous power even at the expense of a comparative loss of such power and prestige on the part of Congress itself.

THE REGULATION OF COMMERCE

Transportation and Communications. The Constitution gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The clause brings under the jurisdiction of the federal government all trade and intercourse with foreign nations, and has been the basis of legislation on that subject throughout the entire period of our history. As for commerce among the several states, although minor measures were enacted from time to time it was not until nearly a century after the adoption of the Constitution that the federal enactment of regulations of interstate commerce began on a large scale. It was the Interstate Commerce Act of 1887 which blazed the trail for broad federal regulations. That measure, expanded and modified from time to time by new enactments, established the pattern of railroad regulation and the regulation of other instruments in interstate commerce, including instruments of water transportation, motor vehicles, and aircraft. The regulations expanded into the fields of telephone, telegraph, and radio. Whether the subject of supervision be the physical transportation of a bulky commodity or the transmission of ideas, the regulatory pattern is so well established in the *United States Code* and in the minds of the people who think in terms of governmental regulation of enterprise that new measures almost inevitably fall into the well-established pattern.

Regulation of Business. The commerce clause has become the basis of broad regulation of business enterprise in a variety of fields. Congress plunged into such regulation with enactment of the Sherman Anti-Trust Act of 1890. The act forbade combinations and conspiracies to monopolize or restrain interstate trade. The purpose of the statute was to preserve for the country the benefits of competitive enterprise, and to prevent powerful combinations from driving individuals and smaller corporate units out of business. The Supreme Court has said of the statute that "as a charter of freedom, the act has a generality and adaptability comparable to that found to be desirable in constitutional provisions."[8] With its several amendments it has prescribed a clearly defined pattern of governmental behavior with respect to business.

Through the Federal Trade Commission Act, Congress sought to outlaw various unfair trade practices in interstate commerce. By other measures it prohibited the shipment in interstate commerce of diseased meat, impure foods generally, and other products and commodities dangerous to the public health and safety. It marked a normal extension of this pattern of regulations when Congress turned to the commerce clause as a constitutional basis for legislation guaranteeing to labor the right of collective bargaining with employers and guaranteeing directly certain other substantive rights such as the right to a minimum wage. In other words, the network of regulatory legislation extends outward in many directions from

8. *Appalachian Coals* v. *United States,* 288 U.S. 344, 359–360 (1933).

the commerce power, and unites in an intelligible pattern a great variety of regulatory activities of the federal government.

THE NATION'S RESOURCES

Disposition of Land. To a very limited extent Congress has always exercised supervision over the natural resources of the country. For many decades its most obvious responsibility in this field lay in the distribution of public land, whether for agricultural purposes or for the removal of timber or mineral resources. Its early policy was predominantly that of getting these resources into private hands, although there were always sharp differences of opinion about homestead legislation and about the desirability or non-desirability of encouraging population to spread itself rapidly into hitherto unsettled country. Vast tracts of land were given to railroad companies as an incentive for the building of new transportation lines. Smaller and more numerous tracts, or the income from the sale thereof, were given to the several states for educational purposes. The general pattern of land legislation, in other words, was that of distribution and exploitation with little thought about conservation for use in the distant future.

The Trend Toward Conservation. The policy of often profligate distribution of natural resources was continued until the latter part of the nineteenth century, by which time most of the good agricultural land of the country had passed into private hands. Around this time a change in attitude began to reflect itself in federal statutes. Congress began to make provisions for the conservation of timber and mineral resources. Conservation practices were extended to cover remaining land still in government hands, and to protect timber resources thereon, particularly where the protection of watersheds and the provision of flood control were involved. Tentatively, Congress began the reacquisition for such purposes of land which had previously passed into private hands. The conservation movement received a new impetus during the New Deal period. The gigantic Tennessee Valley project was initiated. Dams were built at strategic points in the Far West to provide water for agricultural development and water power for the use of industry. People were moved away from so-called sub-marginal lands, and the tracts not fit for agricultural purposes were re-forested or diverted to other uses. Extensive measures were undertaken to prevent agricultural disaster in the semi-arid lands of the West, which for a period came to constitute a gigantic dust bowl. Farmers were taught how better to prevent erosion, and in other ways to conserve the richness of their soil. The tremendous drain upon our resources which was provided by World War II accented the need for more careful conservation and led to the enactment of additional conservation measures. As a result, recognition of the need for careful utilization of our available resources is now broadly reflected in the *United States Code* even though

we have not completely abandoned the assumption that by and large people have the right to waste or conserve their privately owned resources as they see fit.

FEDERAL SUPPORT OF STATE ACTIVITIES

The Basic Pattern. An important legislative trend now well established in the *United States Code* is that of stimulating desirable activities on the part of the states by giving support from the federal treasury. The practice of giving aid in some form, indeed, extends all the way back to the early years of our history, when the donations were primarily in the form of gifts of land or the proceeds from the sale of land for educational purposes. As a result of the demand for better highways which came with the development of the automobile, the federal government instituted broad programs of federal aid to the states to insure the construction and the linking of important stretches of highway. Federal programs for aid to education were expanded. Programs were initiated in public health and in other fields. The device was greatly expanded during the New Deal period to promote the general welfare and to enable the country to escape from the trough of the depression.

Implications of the Pattern of Federal Aid. Implications of the pattern run deep. Local welfare activities are no longer limited to those in which the states can engage as a result of their own borrowing or their own taxation. Because of the desire to enjoy the expenditure of funds offered by the federal government, state governments engage in projects which they would otherwise be slow to undertake. The carrying on of aid programs by the federal government tends to produce throughout the country a uniformity which is not the product of local sentiment but of such syntheses of national sentiment as are made in the federal government. The pattern therefore marks the extension of federal control over local matters, and at the same time the broad and relatively uniform expansion of local services well beyond anything that might have been legitimately expected had welfare services remained the function of local governments.

PROBLEMS OF FOREIGN RELATIONS

Foreign Trade. An important part of the jurisdiction of Congress in the field of foreign relations has been exercised in connection with foreign trade. Although the level of tariffs on imports to be collected by the federal government has always been a matter of strife between political parties, our legislation has reflected the general assumption that tariff measures of some kind are to be imposed. In addition to the taxing power, the commerce power and war powers have provided bases of authority. Congress enacts broad legislation over foreign commerce. For purposes of waging war or of keeping out of war, it from time to time imposes embargoes and other restrictions on the foreign trade of the United States. Since the close of

World War II, Congress has permitted continuation of the control of exports as a part of the strategy of the "cold war" between the United States and Soviet Russia.

International Organizations. Even more broadly than through the regulation of trade, Congress enacts legislation with respect to foreign affairs. Congressional appropriations provide the funds necessary for participation in the United Nations and in the various other international organizations affiliated therewith. The pattern of appropriations and particularly the pattern of financial aid to Western Europe reflects not isolated and sporadic action on the part of Congress, but rather the adoption of a course in international relations which we could not lightly abandon. It is a significant fact also that the aid programs and other programs having to do specifically with foreign affairs are becoming more and more integrated with the domestic legislation enacted with respect to agriculture, industry, labor, and the utilization of our resources.

BROADER CHARACTERISTICS OF FEDERAL STATUTE LAW

In addition to the above summary of the major groupings of subject matter within *United States Code,* there are certain broader characteristics of the *Code* which are worthy of mention. Although the older provisions root back into conditions wherein a predominantly *laissez-faire* philosophy prevailed, the more recent additions reflect a broad commitment on the part of the American people to sweeping governmental control over economic life.

The principles of liberty which derive from the protections of the Constitution show also the modifying effects of our changed pattern of living, with broad restrictions deriving from the changed character of our economy. Many provisions of the *Code* show evidence of movement away from a type of federalism in which the states exercise extensive initiative and toward a more highly integrated nationalism. Furthermore, we see a movement away from isolationist nationalism toward calculated participation in the affairs of the entire world. There also may be discernible a modification in the traditional assumption that military power must always be subordinate to civil jurisdiction, and a promise of growing influence on the part of the expanding military establishment which is deemed necessary for our protection in a turbulent world.

At no important point, however, are changes so drastic as to be deemed absolute. The *Code* changes not all at once, but a little at a time. It is modified somewhat in every session of Congress, but on the whole for any brief period it remains pretty much the same. The new modifies the old, but the old holds back or conditions the pattern of the new. Stability and change go hand in hand. These facts must be kept in mind if we are to understand the legislative process as we should. Congress, in other words, does not legislate in a legislative vacuum. It enacts new measures in terms

of old ones, and the successful application of new measures depends in no small part on the care with which new activities and new functions are tied in with activities and functions which are rooted deeply in the pattern of the entire body of our federal statute law.

References

Federal Code Annotated (Bobbs-Merrill, in continuous revision).
United States Code, with supplements (Government Printing Office, 1946).
United States Code Annotated (West Publishing Co., in continuous revision).
United States Statutes at Large, 1789 to date (62 vols. through 1948. Government Printing Office).

10

Pressure Groups and Lobbying

Congress assembles in regular session every January, not to repeal the existing *United States Code* and replace it with a new body of statute law, but to make amendments here and there at critical points. The average congressman, it is true, gives little thought to the *United States Code* as an integrated body of federal law. He assumes its existence and its continuity just as he assumes the existence and continuity of the Constitution. Perhaps he ought to give more thought than he does give to the pattern of the entire legal structure. However that may be, the political process in which he operates drives him to almost exclusive concentration on particular problems which are crying for attention. He is somewhat like a physician who concentrates on an inflamed appendix, a broken leg, or symptoms of pneumonia rather than on the general health and well-being of the patient. Nevertheless, for the congressman as for the physician, remedial measures have to be taken in the light of problems of general health, and they have inevitable effects upon it. Since the professional survival of a congressman depends upon his pleasing his constituents, and since constituents either know or think they know what they want, the congressman much more than the physician is under compulsion to yield to the demands of the people who will be affected by legislative change. He is in a sense a victim of political pressures. He is in any event the instrument or the channel through which pressures flowing from the people exert their impact on the body of statute law.

THE NATURE OF POLITICAL PRESSURE

The Popular Base. Political pressure, as the term is used here, means the persuasive or the coercive influence which people exert in attempts to control the conduct of the officers of their government. There is nothing necessarily illegitimate about it. It marks the exertion of the popular will, or at any rate the will of individuals and groups, to shape the course of governmental action in a society which calls itself a democracy — which professes to operate its government in terms of rule by the people. If the people are to govern they must have ways of exerting influence over the

officers chosen to perform the acts of governing. The fact that legislators respond to political pressures must not be taken to imply that the congressman is a completely helpless pawn, a rubber stamp for the inevitable, and that it therefore matters very little who is elected to office. The pressures to which he yields are in a high degree created by his constituents and by the public at large. A pressure for legislation to better the condition of industry, of agriculture, or of labor is not an alien influence. It is a flow of power from the centers of strength of our society, of a society which is committed to a high degree of self-government.

In addition to being an instrument by means of which political pressures achieve their impact, the legislator is also a kind of umpire with respect to the utilization of those measures. He is an umpire with the responsibility of an engineer. He is obligated to see to it that political pressures work toward their chosen ends with a minimum of frustration for themselves, and also with a minimum of frustration for still other pressures which also constitute democratic assertions of desire. It is his task to see to it that everybody gets as much as possible of what he wants with a minimum of interference with the wants of others. The legislative process at its best, therefore, includes practice of the fine art of compromise, of that kind of creative compromise which finds a way to give a maximum of all that is desired by all the diverse groups and individuals who seek to determine the course of governmental action. It is the legislator's task to find the highest measure of unity and harmony in areas wherein unity and harmony at first seem impossible.

To illustrate, industrialists and workers and farmers often get so completely at loggerheads that each group tends automatically to oppose any programs sought by the others. Each assumes that there is little harmony of interests, and that any governmental service meant for the other groups will result in injury to self. In actuality all legitimate groups in our society have a great deal in common. It is particularly true that anything done to improve the welfare of agriculture or labor or industry will yield benefits to the rival groups. The better strategy, and assuredly the task of the legislator, is to find the common elements in the programs of rival groups and to work out patterns of legislation for their mutual benefit. There is all the difference in the world in the capacity of individual legislators for achieving the ends of creative compromise. It does, therefore, make a great deal of difference who is elected to Congress.

The Concentration of Political Pressure. The exercise of pressure upon legislators and legislative bodies is not bad in itself. It can and to some extent always does serve the purposes of democracy. It can develop bad characteristics, however, through the unevenness of its operation. The intensity of political pressure on a given subject is not to be measured merely by the number of people whose interests are involved. It is measured also by the effectiveness of the organization of particular pressure groups, by the capacity of pressure group leadership, and by the amount of money avail-

able for use in making pressure effective. For example, those industrialists who have profited by the protective tariff, although constituting but a minority of the population, have been well organized and well financed and therefore effective in directing pressure at Congress throughout most of the period of our national life. American farmers, on the other hand, although a much more numerous group, did not get themselves organized for influencing federal legislation until within the decade of the 1920's. As a result of improved organization they have in recent years developed into one of the most effective aggregations of power in the country. Although we have long had a considerable population of wage earners, labor became highly effective in Congress only within the period of the New Deal. Its accession to power was not necessarily a product of increased numbers, but of better organization and shrewder generalship. Veterans' organizations have political power out of all proportion to the total of the veteran population. Here again strength is derived from effective organization, with aid from the patriotic character of the appeal which veterans are in a position to make.

Because of the difference in pressure group impacts which derive from differences in organization and leadership and finance, the legislator may have considerable difficulty in estimating the desires of all his constituents. He must avoid being misled by streams of costly propaganda, or by rich entertainment, or even by threats as to what will happen to him at the next election if he fails to take "advice." He must also recognize the fact, however, that well-organized and well-financed pressure groups, even though constituting in themselves only minorities of the population, may be able to control large blocs of votes in the next election. He may therefore have severe struggles with his conscience as he makes a choice between what he suspects to be the general preference of the people but which will bring him no organized support, and an opposing line of action which will at least make no powerful enemies.

Legislative Independence. The task of the legislator has still further complications. It is contended by some people that the responsibility of the legislator goes beyond that of resolving conflicting political pressures, and that it includes the exercise of independent judgment on political matters. It is said that the legislator neglects his duty if he permits pressure of any kind to drive him from the course which he believes to be right. Most thinking people avoid both the extreme position of regarding the legislator as a mere delegate of the electorate, and the opposite position of regarding him as having a mandate exclusively to exercise his own judgment for the period of his term of office. The average citizen suspects that legislators, like other government officials, tend to get intoxicated with the possession of power, and that deviations from popular desires are likely to reflect not so much differences of judgment or of ethical standards as the growth of egotism. On the other hand, the fact is recognized that a man does not cease to be both a man and a citizen when he is elected to Congress. It is

expected that his knowledge and judgment on public affairs will develop in terms of his experience in office. It is assumed that his immediate contact with political problems will entitle his judgment to a certain amount of deference in the face of differing public opinions.

So it is that in addition to appraising the sources and the intensity of political pressure, the legislator who does his full duty must also exercise some independence of judgment. He operates in the midst of a bewildering complex of pressures. Manufacturers' organizations demand relaxation of government controls and reduction of taxes; wool interests demand a high protective tariff; labor unions demand legislation to better the position of labor; liquor interests demand removal of rationing restrictions which turn grain away from them to relieve a critical need for food; medical interests oppose extension of public medical services through what they call socialization; butter interests seek maintenance of a discriminatory tax on the sale of oleomargarine; government workers seek higher pay; educators seek federal support for education.

The legislator feels the combined impact of all these pressures. The total of pressure is so tremendous that he finds it hard to think in terms of anything except its intensity. It is hard to discriminate in such a way that some groups will be permitted to achieve ends which the legislator deems socially desirable, whereas others no less strong and persistent will be frustrated. Yet there is likely to be great difference among them in the degree of their social justification. It is the mark of the statesman to search for such difference and to act in terms of it. Many factors determine the extent of the statesmanship to be displayed by individual legislators. Amid the pressures under which he operates, the average member of Congress has little time for reflective thinking. He must take into account the probable effect of independent action upon his own political career. He is likely to think his own re-election important in terms of the country's welfare. The game of politics usually does not invite martyrs — or at any rate, would-be martyrs do not usually achieve election to Congress. Idealism is likely to be shaded by a sense of the importance of one's own political career. Survival is not always at stake, however, and there are men who jeopardize their legislative careers by firmness of action on issues on which they feel deeply.

MAJOR SOURCES OF PRESSURE ON CONGRESS

Political Parties as Pressure Groups. Non-governmental groups which are organized to exert pressure for the control of governmental action are called pressure groups. Something in our thinking with respect to the operations of pressure groups has given the term a bad connotation. We therefore hesitate to apply it to organized pressures which we regard as completely acceptable. It is perhaps for this reason that we make a distinction between pressure groups and political parties. We are not likely to characterize a political party as a pressure group if we regard it as "one

of the greatest inventions in our political civilization."[1] We are not likely so to characterize it if we regard it as "the only kind of organization that can translate into fact the idea of majority rule."[2] We are not likely to characterize the political party as a pressure group if we advocate the control of legislative policy in Congress by a caucus consisting of the congressional membership of the majority party.[3] Even if our approval of the political party as an instrument for the control of legislation is less sweeping, we are nevertheless accustomed to the organization of both houses of Congress by party groups and the placing of legislative machinery in the hands of the leaders of the majority party. We see such acceptance of party action within Congress itself as is indicated by the fact that one side of each house is allocated to Republicans and the other side to Democrats. So it is that political parties are at the same time in effect part of the machinery of congressional operations, and aggregations of people who have special interests in the shaping of legislative policy.

The operation of parties as pressure groups is somewhat obscured by the fact that most of the leaders who give effect to party policy, and indeed who determine the content of that policy, are at the same time members of their respective parties and of one or the other of the two houses of Congress. Because of their joint membership it is hard to distinguish their activities as legislators from their activities as party members. The exerting of party pressure in its capacity as party pressure is more clearly revealed when party groups meet outside Congress for the definition of party policy with respect to government, and when the assembled groups include prominent party members in addition to those who are members of Congress. A good example was the meeting of the post-war advisory council of the Republican party which was held at Mackinac Island, Michigan, in September, 1943. The purpose of the meeting, which included prominent Republicans from all over the country whether or not they were members of Congress, was to re-define the policy of the Republican party with respect to the scope of American participation in world affairs. The meeting issued a statement of policy which undoubtedly played an important part in reconciling Republicans in Congress to collaboration with Democrats in supporting the program of the United Nations. Again in December, 1949, a call from Republican National Headquarters brought in a flood of letters from Republicans all over the country with respect to the redefinition of party policy before the 1950 congressional campaign.

Because as far as the majority party in Congress is concerned, the personnel of party leadership and the personnel of congressional leadership are likely to be pretty much the same, it is easier to differentiate between party leadership and congressional leadership in the minority party than in the majority party. Even in the majority party, however, the part played

1. E. E. Schattschneider, *The Struggle for Party Government* (College Park, Maryland: University of Maryland, 1948), p. 22.
2. *Ibid.*, p. 10.
3. See the speech of Senator Hubert H. Humphrey, Jr., before the *New York Herald Tribune's* Eighteenth Annual Forum, *New York Herald Tribune,* October 30, 1949.

by party considerations is oftentimes easily distinguished. The President, for example, in presenting to Congress his program of desired legislation, oftentimes does so in such a way as to make it clear that he is speaking not merely as President, but as leader of his political party. The majority leadership also frequently makes such a distinction possible. In December, 1949, for example, the Democratic party announced that it planned two reports to the country on the work of the Eighty-first Congress. The reports were to start a concerted effort to whip up public sentiment for enactment of President Truman's Fair Deal Program. In that connection Vice-President Alben W. Barkley was expected to sum up the party's position as Congress came back for the second session of the Eighty-first Congress.[4]

Even the lesser minor parties, indeed, which may have little or no representation on the floors of Congress, sometimes wield considerable influence. The Socialist party, for example, under the able leadership of Norman Thomas, is oftentimes effective in building up public sentiment against a position of isolationism, or against war measures, or in favor of measures to alleviate distress among suffering groups. The various so-called progressive parties which have been in operation at various times have, like pressure groups of other kinds, sponsored particular causes with such effectiveness as to influence congressional action directly or indirectly.

Pressure from Business. Although in some ways political parties take the lead among pressure groups operating upon Congress, other groups are more conventionally classified in this category. Frank R. Kent, political commentator of the Baltimore *Sun*, has said that "undoubtedly, the four most powerful groups of voters in the country — and the four most influential lobbies in Washington — are those representing labor, the farmers, the Negroes and the veterans."[5] The comment is clearly correct, at least as it applies to labor, the farmers, and veterans. It neglects the most powerful group of all, however, American business. Even in the years of its infancy, and of the infancy of the United States as a nation, business exerted a strong influence upon governmental affairs. It was largely the desire to promote business enterprise, indeed, that gave rise to the Constitutional Convention of 1787. Not long after the adoption of the Constitution, American manufacturing interests brought about enactment of protective tariff legislation by means of which consumers were required to pay toll to domestic producers. At varying levels that toll has been collected ever since. Business interests had a great deal to do with the entrenchment and maintenance of *laissez-faire* conceptions in governmental policy. Over every step of the way it has fought the establishment of governmental control in the public interest. While it has suffered defeat after defeat in a seemingly inevitable trend, it has been highly effective in delaying and crippling the effectiveness of the extension of regulatory power.

As a pressure group, it is true, business operates as a unit only in oppos-

4. *New York Times*, December 20, 1949.
5. Frank R. Kent, "The Great Game of Politics," Baltimore *Sun*, March 7, 1948.

ing other major aggregations of power, such as agriculture and labor. Within its own ranks it undergoes an enormous amount of conflict. Warring business groups clash with one another in efforts to bring about or prevent particular types of legislation. For example, representatives of transportation respectively by railroad, by buses, by water, and by air, may compete vigorously for control of legislation in the areas of rivalry. Where such opposing interests exist each group engages in political vote-getting to the extent of its powers.

A great deal of federal regulatory legislation, enacted nominally in the public interest, has in actuality been enacted as a result of pressure from one group seeking protection against or establishment of an advantage over another. Anti-trust laws were enacted primarily to protect aggregations of small business against predatory combinations in restraint of trade. The Federal Trade Commission Act, giving power to define and prevent unfair trade practices, was enacted as much to protect competing businesses as to protect consumers. Even the National Industrial Recovery Act of the New Deal period, enacted though it was when business leadership was demoralized by the depression, was drafted in the light of the admittedly basic importance of business enterprise and for the purpose of helping all sorts of businesses to get along together more satisfactorily than they could do under the previous highly competitive regime. Legislation on economic matters enacted during and after World War II was drafted with a solicitous eye to business welfare and business approval.

In view of the important part which business plays in the life of the country, it is of course not surprising that it is effective in shaping the course of legislation. To a considerable extent it is true, in the Coolidge phrase, that "the business of the United States is business." It is peculiarly true in this country that the word "business" symbolizes power. The function of legislation is to channel but not to block the flow of power. To a considerable extent we continue to think in terms of business even when we act in terms of law. It is therefore quite understandable that business pressures, by means to be discussed more fully below, should enter into the legislative process and to a considerable extent determine the content of legislation.

Pressure from Agriculture. Although at the time the Constitution was adopted a large percentage of the American people were farmers, or were closely dependent on agriculture for a livelihood, farmers in their capacity as farmers made no extensive demands for federal legislation and exercised little important influence upon it until after the close of the nineteenth century. Throughout that century farming was highly individualistic. Farmers were interested in certain measures, it is true, such as homestead legislation, tariff legislation, currency legislation, and legislation with respect to railroads and monopoly, but they had neither the pattern of ideas nor the organization necessary for making themselves politically effective. It was not until the 1920's, indeed, after the slump in agricultural prosperity

which followed the boom period of World War I, that farm groups achieved effective organization for pressure in Congress. It was at that time that the so-called farm bloc of agricultural representatives was organized. The farm bloc in Congress had its counterpart outside legislative halls in the American Farm Bureau Federation and other farm organizations which in county seats, in state capitals, and in Washington worked continuously at programs for betterment of farm conditions. Their legislative demands of the period were phrased in terms of "farm relief." Friends of farmers both in and out of Congress sought legislation to relieve the strain of debt by the improvement of credit facilities to get rid of surplus products by dumping them in foreign countries according to various proposed arrangements, and in other ways to improve the marketing of agricultural products.

The experience of agricultural interests during the 1920's with organization to secure federal aid of one kind or another was important not merely because of the amount of aid actually won. Helpful legislation was enacted, but the real achievement lay in the discovery that, by banding together, farmers could exercise real power over the program of the federal government. After the business collapse of 1929, which resulted in chaos and distress in agriculture as well as in other fields, farm organizations utilized their past experience in making effective their demands for new legislation. The Agricultural Adjustment Act of 1933, the soil conservation and marketing statutes enacted thereafter, and various other measures which bore the stamp of the New Deal, became monuments to the power of the newly self-conscious aggregation of American farmers. The maintenance of farm prices by federal subsidies proved so palatable as medicine for agricultural ills that Congress was unable to resist pressure to continue the subsidy device even after the depression had come to an end. So it is that agriculture has taken its place alongside business as the manipulator of a tremendous concentration of power for determining the course of federal legislation.

Pressure from Labor. Labor, like agriculture, has rather recently come into the field as a powerful pressure group affecting federal legislation. The American Federation of Labor won what it regarded as its first great legislative victory with enactment of the Clayton Act in 1914, which included provisions restricting the power of federal courts to issue injunctions in labor disputes. This statute, initially hailed as labor's Magna Carta, was greatly weakened by judicial interpretation, however, so that organized labor had to struggle for an additional eighteen years before a new statute, the Norris-LaGuardia Act, effectively restricted the power of injunction.

Apart from these measures and certain others protecting the rights of railway workers, organized labor came into its own as a source of power over federal legislation only with the New Deal period of the 1930's. The program set up under the National Industrial Recovery Act was intended to bring shorter hours, higher wages, better working conditions, more uniformity in employment, and other benefits. The National Labor Relations

Act of 1935 assured the right of collective bargaining throughout most of industry. The Social Security Act made provision for periods of unemployment and for old age, and the Fair Labor Standards Act established minimum wages and in other ways sought to improve conditions.

The friendly attitude of the New Deal administration, and the improvement in the position of organized labor which resulted from enactment of New Deal statutes, made the forces of labor for a time the most imposing concentration of political power over legislation. Retention of such power, however, was dependent in part upon the continued approval of the administration and upon the skillful and to some extent self-restraining exercise of that power in the face of the opposing power of industry and of some parts of agriculture. The inclination of some labor leaders to abuse the exercise of power strengthened somewhat the hand of the opposition, with the result that a number of restrictive measures, culminating in the Taft-Hartley Act of 1947, were enacted.

Pressure from Veterans. As a result of the developments previously described, the country approached the halfway mark of the twentieth century with the three aggregations of power — business, agriculture, and labor — approximately in equilibrium, but with labor in a somewhat defensive position and with business making a special effort to reassert its earlier dominance. In the midst of these groups another, the veterans, vigorously reasserted itself after replenishment through demobilization at the close of World War II. Within the range of their interests, veterans have been highly influential in Congress throughout the period since the Civil War. Their power is enhanced, indeed, by the narrowness and the concentrated character of their interests. They want bonuses for veterans, pensions for veterans, medical services for veterans, education for veterans, and preferences for veterans among government officeholders. Their organizations sometimes take positions on other matters such as preparedness for war, universal military training, the handling of aliens, and the coping with dissent of any kind, but their prime concern is with the relatively direct betterment of the economic position of veterans themselves.

The result of veterans' influence may be for better or for worse in its effect on the welfare of the country as a whole. Those who believe in spending the country's way into prosperity must see that expenditures on veterans spread to other parts of the population and therefore achieve somewhat the same results as the stimulation of spending power at other points. Those who are conscious of a debt of gratitude which the country owes to the men who have fought its battles can derive a measure of comfort from the fact that special treatment for the veterans goes toward the payment of the country's moral debt. Provision for veterans' education compensates in part for the time lost in military service, and veterans' preference in government jobs aids in restoring the balance of employment which is inevitably lost when millions of men are taken from government employment as well as from other walks of life for use in the armed services.

On the other hand, expenditures on veterans have had inflationary tendencies and have expanded the debt. Veterans' preferences in government employment often keep substandard workers in positions which would otherwise be occupied by better people. The outcome of veterans' pressure on Congress is often primarily to produce unequal distribution of the resources and the opportunities of the country, not in terms of any broadly understood conception of welfare but in terms of the coercive power of a well-organized and single-minded pressure group.

OPERATIONS OF PRESSURE GROUPS

Methods of Lobbying. The powerful pressure groups or interest groups discussed above are merely outstanding among large numbers of other such groups or sub-groups. The Negro race, for example, constitutes one such group, without having as yet attained power in any sense comparable to the power of the groups already discussed. Religion, education, law, medicine, and other professions and disciplines could likewise be discussed as pressure groups and in terms of the impact of their operations upon federal legislation.

The methods by which pressure groups make themselves felt in Congress are usually referred to as "lobbying." The activity takes its name from the long established practice by which interested parties have congregated in the lobbies of legislative halls to find out what legislators were doing and planning to do, and to seek legislative favors. The words "lobbying" and "lobbyist" have unpleasant connotations because they imply the exercise of undue influence upon legislators who ought to think and act for the welfare of the entire community rather than merely for the welfare of special interests. It is undoubtedly true that in some legislatures at some times some lobbyists have bought outright the votes of legislators, that they have bought other votes by less direct means of doing favors to legislators, and that they have intimidated legislators who could not be influenced by the simple expedient of the payment of money. Not all the activities of lobbyists or of pressure group representatives, however, are of the same low order. In Washington the term lobbying is applied to all phases of interest representation. It is applied to the activities of all groups which have spokesmen or information offices there for the purpose of accumulating information and persuading government officials to act in harmony with their interests. Many of them perform very real services. In order wisely to plan the diverse legislative measures which it must enact or consider for enactment, Congress must have access to an almost inconceivable variety of information. Some of that information is available in government files or in the knowledge of government personnel, but much of it is not. Oftentimes the most convenient sources of information are the representatives of the various interest groups which have offices in Washington and are eager to provide information on their fields. If a technical railroad question requires an answer, a telephone call to the office of the Association of

American Railroads may bring it. If the question is one of agriculture, the American Farm Bureau Federation may be able to answer it more quickly and more adequately than the Department of Agriculture. An intricate business problem may be referred not only to the Department of Commerce, but also to that powerful lobbyist organization, the Chamber of Commerce of the United States.

Lobbyist Use of Congressional Hearings. In any event, whether or not Congress actively seeks information and advice from lobbying groups, a great deal of such information and advice will be submitted without request and will oftentimes be gratefully received. The purpose of holding committee hearings on important bills is to get the reactions of as many as possible of the interested parties and to accumulate as much as possible of the relevant information. One illustration of the array of contending forces in congressional committee hearings on a proposed statute is provided by the hearings held in 1947 on what was called the Portal-to-Portal Pay Bill. The purpose of the bill was to amend the Fair Labor Standards Act to eliminate the requirement that the employer begin payment of wages as of the time when the worker entered the portal of the employer's establishment. Labor interests were, of course, opposed to the bill. On behalf of labor the following testified at the hearings:

Special Council, Amalgamated Clothing Workers of America
Member, CIO United Steelworkers of America
Member, Mine, Mill and Smelterworkers
Employee, American Steel Foundry
National Legislative Representative, American Federation of Labor
Washington Representative, United Electrical, Radio, and Machine-workers Union, CIO
Regional Director, Industrial Union of Marine and Shipbuilding Workers, CIO
Member, Textile Workers Union, CIO
General Counsel, Congress of Industrial Organizations
Legislative Representative, United Automobile Workers, CIO
Member, Textile Workers Union, CIO

Large numbers of business interests, on the other hand, urged enactment of the measure in some form. Among the representatives were the following:

General Counsel, Associated Industries of Kentucky
Secretary, American Mining Congress
Treasurer, Potash Company of America
President, American Rolling Mill Company
Manager, Manufacturing Department, United States Chamber of Commerce
Director, National Small Business Men's Association

Attorney, Milwaukee Solvay Coke Company
General Counsel, Republic Steel Corporation
General Counsel, American Trucking Associations
Executive Secretary, Western Woods Employers
Counsel, National Association of Manufacturers
Counsel, Manufacturers' Association of Connecticut
Chairman, Board of Governors, Aircraft Industries Association
President, American Zinc, Lead and Smelting Company

To the latter list could be added also the names of two very able lawyers who appeared nominally in their own interests alone, but whose connections were such as to indicate that they appeared actually as representatives of industry.[6]

These various representatives of interest groups performed a double function. In the first place they exerted to the full extent of their ability the power of their groups either to prevent enactment of legislation or to bring about its enactment in the form most suitable to them. In the second place, their testimony revealed to the congressional committee the complexities of the situation and the matters which needed most to be taken into account in the phrasing of the legislation if legislation were to be enacted. Lobbyists performed these functions not only at formal committee hearings but at every point where they made contact with Congress.

The Variety of Lobbying Activities. Lobbying is in process all the time that Congress is in session and, in some way or other, much of the time when Congress is in recess. Subject matter and methods are infinite in their variety. The committee hearings previously referred to provide an example of the operation of pressure groups upon legislation through congressional committees. A miscellany of other activities which occurred for the most part within a period of a few weeks of one another is presented hereafter to give substance to the discussion.

In 1948, conservative business interests waged a campaign for drastic reduction of federal taxes from the level prevailing during the war period. The National Association of Manufacturers urged adoption of a tax program of its own. When it was forced to abandon hope for enactment of its own measure it endorsed as a temporary expedient a much less drastic reduction measure which the House of Representatives had approved.[7]

Congress considered again the St. Lawrence Seaway and Power Project, which has been a subject of controversy throughout the present century.

6. *Portal-to-Portal Wages*, Senate Judiciary Subcommittee Hearings on S. 70, 80th Cong., 1st sess. Former members of Congress make effective lobbyists because they know people and know their way around in Washington. The friendships of particular men in Congress for a given cause are important. In 1950 the representative of the so-called Committee for Constitutional Government, an ultra-conservative business lobby, interested in restricting governmental regulatory power, admitted that friendly members of Congress allowed use of their congressional franking privilege to mail from eight to ten million pieces of propaganda literature without cost — or rather, at government expense. *New York Times*, June 29, 1950.

7. *New York Times*, March 5, 1948.

By dredging the St. Lawrence River and constructing locks and dams, the project would permit ocean-going traffic from the Atlantic into the region of the Great Lakes for a period of several months each year. It would revolutionize transportation from the Great Lakes area. It would include also an extensive power project. States in the Great Lakes region which would benefit by the project have always been enthusiastic about it. It would be expected, however, to endanger the interests of groups and parties elsewhere. It is assumed that the waterway would take traffic from the ports of Boston, New York, Philadelphia, Baltimore, New Orleans, and other places. It would reduce cross-country railroad traffic; it would thereby reduce the consumption of coal. Production of electric power might well endanger private power interests. As a result, therefore, while all sorts of interests argued enthusiastically for the adoption of the project, others fought just as vigorously against it, and in the Senate where it received consideration from the floor, finally succeeded in getting the measure sent back to the committee for further study. The port organizations and business groups of the several port cities, the railroads, the coal companies, and labor unions in the coal fields, threw all their weight against it with at least temporary success.[8] The point here involved is not either that the project ought to be adopted or that it ought to be abandoned, but rather that the course of decision is being largely determined by the balance between the aggregations of pressures on the two sides.

In 1947, as a result of the general food shortage throughout the world, the government found it necessary to limit the amount of grain to be used for the manufacture of alcohol. Distilling interests accepted regulations with reluctance, and in 1948 fought bitterly against extension of the power of rationing. Among other things, the Schenley Distillers Corporation ran a huge advertisement entitled "Is Prohibition Coming Back?" It argued that the real motive for restriction was not aid to Europe but the reestablishment of prohibition as after World War I. For the education of members of Congress it ran the copy of the advertisement in the *Washington Post*.[9] A Washington reporter declared that the so-called whisky trust, consisting of three powerful distilling organizations, had put pressure on key members of Congress to change the allocation of grain allotted to distillers in such a way as to give most of it to the three organizations.[10]

The Butter-Oleo Fight. One of the most interesting struggles between pressure groups has been that between dairy interests and the producers of oleomargarine. As a result of the butter shortage during and after World War II and the consequent high price of butter after the end of rationing, the device of discouraging the sale of oleomargarine by means of a high federal tax became objectionable to more and more consumers, and oleo-

8. For sample references see the *New York Times*, January 27 and 28 and February 1, 1948. For debates in the Senate see index to 94 *Congressional Record*.
9. *Washington Post*, January 27, 1948.
10. See Drew Pearson, "The Washington Merry-Go-Round," *Washington Post*, March 3, 1948.

margarine producers took advantage of the occasion to attack the tax legislation. They lobbied both with the public and with Congress. An example of a combined attempt to influence both consumers and legislators was an advertisement signed by the American Soybean Association and the National Cotton Council of America. It was entitled "An Appeal to Congress from 2,300,000 American Farm Families." It declared that oleomargarine was a healthful food and denounced the requirement that it be bleached white in order to avoid a tax of ten cents per pound when the oils used in making it were naturally yellow. To show the voter interest back of the margarine cause it declared that cotton, one of the sources of oil for the production of margarine, was produced in eighteen states on 1,600,000 farms and that soybeans, another source, were produced by approximately 700,000 farmers. It tied in with another issue of the moment by declaring that anti-margarine laws were inflationary.[11]

Margarine producers offered in Congress evidence that margarine was just as healthful as butter, while dairy producers countered with evidence that cheaply produced margarine had in particular instances been colored to look like butter and sold at butter prices.

The issue was debated so hotly in the House Agriculture Committee that one member urged the chairman to "let us iron these differences out in private. This bickering makes us all ridiculous." This particular member was in a fortunate position. His district produced both butter and soybeans: he was therefore neutral. One witness before the committee, the representative of the District of Columbia Women's Clubs, remarked after listening to a fifteen-minute interchange between differing members of the committee, "I feel right at home, gentlemen. This sounds like a women's club meeting." It was said that the bitterness displayed by the two factions attracted overflow crowds to the committee hearings.[12]

While the struggle continued over the federal tax on oleomargarine, the butter-oleo warfare spread to another area. In 1931 butter interests had succeeded in getting included in the act which made appropriations for the Army a provision that with certain exceptions none of the money appropriated could be spent for oleomargarine or butter substitutes for other than cooking purposes. The provision was re-enacted each year thereafter until 1949, when the House of Representatives passed the Army Appropriation Bill without this provision and the Senate Appropriations Committee reported the bill for action on the floor of the Senate likewise without including this provision. Prominent in the background was the National Association of Margarine Manufacturers on the one hand, and the National Cooperative Milk Producers Federation on the other. Oleo at that time was being retailed at just under 34 cents a pound, and butter at just under 74 cents. The margarine interests contended that the purchase of margarine in the place of butter would result in saving some hundreds of thousands of dollars. The butter interests replied that making such a shift would save

11. *Washington Post*, February 17, 1948.
12. *Ibid.*, March 11, 1948.

nothing at all and would rather cost additional thousands of dollars since the government was already committed to purchasing enough butter to maintain the butter price at a given level, and it would have to purchase still more butter for price maintenance purposes if the army abandoned butter for oleo.[13]

When the bill reached the floor of the Senate a group of senators consisting of both Republicans and Democrats from dairy states combined to introduce an amendment which would reinsert the restriction on the use of oleomargarine as a butter substitute. They talked in terms of economy, the right of soldiers to have the best in the way of food, and the need for protecting the interests of independent American farmers. They introduced some thinly veiled comments about the equitable distribution of government favors between the North and West, where butter was produced, and the South, where cottonseed and other nut products were used for the manufacture of oleo. Senator Alexander Wiley, for example, a Republican from Wisconsin, argued that

> We of the North eat peanutbutter and pay a big price for it; we permitted cotton to go abroad with an export subsidy. I ask those who have received benefits for peanuts and cotton to give us a little consideration in this matter. We of the dairy states consume a great deal of cottonseed and cottonseed oil, which are used in the feeding of dairy cows. They help make fertilizer, which rejuvenates the soil. It is a serious matter to permit a small, efficient group making a substitute product to impact a segment of our economy in the great Middle West, composed of individuals who never come to Washington to ask for a hand-out.[14]

In this instance the oleomargarine group proved the stronger. Although the anti-margarine amendment was supported by dairy Republicans and dairy Democrats alike, it was defeated by a vote of 31 to 45.[15]

Education. The National Education Association and other educational organizations have attempted for many years to secure substantial federal grants for education in addition to those already made. A controversial point has been whether such funds, if appropriated, should go only to public schools or should be distributed to parochial schools as well. An organization called Protestants and Other Americans United for Separation of Church and State published a manifesto in opposition to federal aid to parochial schools. It stated that a proposed federal grant of several hundred million dollars annually in aid of public education had been under consideration by Congress for many years, but that "Action on this proposal has been held up by the pressure of this [the Catholic] Church which demands that its parochial schools shall share with the public schools in any such federal appropriation in an amount proportional to the number of pupils in each school system." It declared that "Protestants and Other

13. Frank R. Kent, Jr., "Dairymen Gird to Fight Oleo for the Military," Baltimore *Evening Sun*, August 20, 1949.
14. *Congressional Record*, August 26, 1949, vol. 95, part 9, p. 12326.
15. *Ibid.*, August 29, 1949, p. 12424.

Americans United respectfully demand that Congress shall not by such an evasion abdicate its responsibility to defend the Constitution, regardless of political pressure on the part of any sectarian interests which would thus subvert it." [16]

Housing. A bill providing for a long-range housing program ran into difficulties because of opposition by private housing interests and no doubt for other reasons. To supply pressure on behalf of the bill, certain members of the House of Representatives who favored it scheduled a National Veterans' Housing Conference to be held in Washington. Some fifteen hundred veterans from every state in the Union were expected to attend the conference. The purpose of calling the conference was to secure enough pressure to get the necessary 218 signatures for a petition which would compel a House Committee to present the bill for consideration on the floor of the House.[17] The National Association of Real Estate Boards constitutes one of the most powerful lobby agencies in Washington for the prevention of enactment of legislation. One of its major functions is to oppose the enactment of legislation providing for large-scale construction of housing by the federal government.

The Aircraft Industry. The *New York Times* carried a full-page advertisement which was headed "From the Report of the President's Air Policy Commission: Six Conclusions on which the Peace of the World may Depend." The six conclusions were listed as follows:

1. American Security Depends upon Air Power
2. Our Present Air Power is Inadequate
3. We should Build Up our Air Force and Naval Aviation, and Strengthen the Airlines
4. This Air Power Program should be Undertaken At Once
5. The Program should be Planned Five Years Ahead
6. The Annual Cost will be High, but Cheaper than Another War

Although these conclusions were taken from the Commission report, the significance of their inclusion at this point lies in the fact that the advertisement was that of an airplane manufacturer, the United Aircraft Corporation.[18]

One large aircraft corporation which operates extensively in foreign commerce was said repeatedly to be attempting both to extend monopoly control over foreign commerce and to be seeking entrance into the domestic transportation field. According to widely prevalent gossip, favors in the way of free transportation and other services were accepted by one United States senator, who attempted in various ways to aid the company through his senatorial position.[19]

16. *New York Times*, January 12, 1948.
17. *Washington Post*, January 23, 1948.
18. *New York Times*, January 21, 1948.
19. See Drew Pearson, "The Washington Merry-Go-Round," *Washington Post*, March 6, 1948.

Other Major Businesses. Public utilities of various kinds maintain powerful lobbies in Congress and in state legislatures. The Association of American Railroads has already been mentioned. Companies generating and distributing electric power have exerted great pressure to prevent effective regulation of rates and to avert competition from power generated and distributed by government. Their lobbies have been among the most notorious in American history.[20] Powerful oil and gas interests are likewise well represented. They, too, are concerned with curbing governmental regulation, and with getting access to oil and gas which underlie land owned by the federal government and land beneath the bed of the ocean, over which the federal government has jurisdiction. These interests are said to have representatives in Washington not only as registered lobbyists, but as members of Congress itself. They attempt to exert influence not only over legislation but also over appointments made in the executive branch of the government where their own interests are involved.[21]

The Medical Lobby. Professions, as well as businesses, are represented among lobbyists in Washington. In 1948, after President Truman's administration had committed itself to a program of compulsory health insurance, it was announced that the American Medical Association would collect $25 from each of its 140,000 members, or a total of $3,500,000, for a war chest to use in opposition to the federal program. The announcement of the American Medical Association stated that the money would be used

> For a nation wide plan of education on the progress of American medicine, the importance of the conservation of health and the advantages of the American system in securing a wide distribution of a high quality of medical care.[22]

A dissenting group of members criticized and refused to pay the $25 assessment. The Board of Trustees of the American Medical Association replied to their criticism by saying that the funds were not being used for "legislative lobbying" but would be

> Devoted chiefly to education of the American people as to the present high quality of medical service in our country, and to the inevitable deterioration, as shown in other countries associated with a governmental system of medical care.[23]

This technique of influencing constituents, who will themselves put pressure on members of Congress, is of course one of the most effective techniques employed by legislative lobbyists.

20. See for example H. S. Raushenbush and Harry W. Laidler, *Power Control* (1928).

21. See Drew Pearson, "The Washington Merry-Go-Round," *Washington Post,* February 18, 1948, and Marquis Childs, "Washington Calling," *Washington Post,* February 12, 1948.

22. *Washington Post,* December 3, 1949.

23. *New York Times,* February 19, 1949. See Milton Mayer, "The Dogged Retreat of the Doctors," *Harper's Magazine,* December, 1949, reprinted *Congressional Record,* (temporary daily edition), January 6, 1950, pp. A44–49. In June, 1950, it was announced that the board of trustees of the American Medical Association had approved expenditure of $1,100,000 in a newspaper and radio campaign to fight the administration's program for compulsory health insurance. *New York Times,* June 27, 1950.

LOBBYING FROM WITHIN THE GOVERNMENT

Government Workers. Differing in some respects from the lobbying of outside groups is that carried on by groups within the government itself. The activities of government workers who are concerned about compensation, classification, retirement benefits, and other such considerations are of this kind. Worker organizations often demonstrate keen political insight in their use of political techniques. An example is provided by the following excerpt from a newspaper item entitled "Wife of Postman Rings Bell at Pay Inquiry in Senate":

> The wife of a Washington letter carrier yesterday delighted a Senate Civil Service Subcommittee with an eyeful of pulchritude and shocked it with an earful of what it takes to live on a postman's pay.
>
> Mrs. Jeanne Bolen of 2606 17th st. ne., mother of three boys, gave the subcommittee her household budget of $3274.71, which included nothing for recreation and emergencies but did include $49 for her husband's work shoes. She pointed out the impossibility of stretching $3100 that distance, even though "I'm economical, I really am."
>
> "One of the boys," she added, "asked for a pound of butter for Christmas. He didn't get it." [24]

Military Lobbying. The military departments of the government have been among the most flagrant violators of the rule against lobbying at government expense to influence congressional policy. The *United States Code* provides that no federal money shall be used to pay for any personal favors or communications

> intended or designed to influence in any manner a member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation.[25]

The provision is not easily enforced, and by common consent a certain amount of evasion is overlooked. Evasion sometimes reaches the stage of grossness, however, as when the War Department, now the Department of the Army, in its eagerness to bring about the establishment of universal military training, sent paid propagandists throughout the country to convert people to their own beliefs and to persuade them to put pressure on Congress to enact the necessary legislation. A House subcommittee submitted in the summer of 1947 a report of evidence that "the War Department is using government funds in an improper manner for propaganda activities supporting compulsory military training, or what is commonly referred to as 'Universal Military Training.'" [26] One paragraph of the report read as follows:

> One of the civilians employed by the War Department was Alan Coutts, of New York City. Mr. Coutts toured the country at the taxpayers' expense,

24. *Washington Post*, January 17, 1948.
25. *United States Code*, Title 18, Sec. 201.
26. House Report No. 1073, 80th Cong., 1st sess., p. 1.

> conducting radio panels and speaking to groups wherever and whenever they could be assembled. The radio panels were top-heavy with persons selected to speak for universal military training. Material supporting legislation was prepared at the War Department by Mr. Coutts, for distribution to participants in the radio discussions. Evidence before the committee reveals that, on March 5, 1947, over Station WIP, in Philadelphia, Pa., Mr. Coutts asked that the listening audience write to the radio station; and that the letters received would be forwarded to proper congressional authorities.[27]

Early in 1948, when the same subcommittee held additional hearings on the subject, a member of the committee staff produced evidence that the department was continuing propaganda for universal military training. The Secretary of the Army, Kenneth C. Royall, was called to testify as to his ideas on the dissemination of public information by the Department of the Army. He admitted knowledge of federal laws prohibiting the use of federal funds to disseminate propaganda, but contended that such laws had not been violated. He contended that the Department had an obligation to keep the American people informed of needs for national defense and that universal military training was one of the relevant subjects. Argument for its adoption, he maintained, was only an incident to the obligation to give this information.[28]

The Secretary's answer made clear the difficulty of drawing a line between the giving of legitimate information to the people and the illegitimate spreading of propaganda at government expense by government agencies. It also indicated the determination of top military leaders to continue public advocacy of the adoption of universal military training. Public pronouncement by Secretary of Defense Forrestal and others indicated that this policy had general military support.[29]

The three military departments are rivals, sometimes bitter rivals, in their pursuit of favors from Congress. In April, 1949, the Armed Services Committee of the House of Representatives denounced continuance of this internal strife in the following language:

> The Armed Services Committee wants it clearly understood that if persons in the Armed Services or in their employ continue to pass statements to the press which are calculated to deprecate the activities of a sister service and which, at the same time, jeopardize the national security, the committee will step in with a full-scale investigation.
>
> We will not tolerate the continuance of this practice.[30]

This rebuke was provoked by misbehavior within the Department of the Air Force. Later in the same year the giving out of statements by officers in the Department of the Navy led to a full-dress investigation before the

27. *Ibid.*, p. 2. For the supporting evidence see *Investigation of War Department Publicity and Propaganda in Relation to Military Training*, Hearings, Subcommittee of Committee on Expenditures in the Executive Departments, 80th Cong., 1st sess.

28. See *Investigation of War Department Publicity and Propaganda in Relation to Military Training*, 80th Cong., 2nd sess., pp. 5–19. For comment see *New York Times*, January 15, 1948, and Drew Pearson, "Washington Merry-Go-Round," *Washington Post*, January 24, and February 21, 1948.

29. See *New York Times*, January 25, 1948.

30. *New York Times*, April 6, 1949.

committee in which, over a period of days, representatives of the Navy sought to show discrimination against them in the Department of Defense and in which these charges were answered by leaders of the other services. Lobbying from these sources apparently goes on largely undiminished.

The Corps of Engineers. One of the most effective government lobbyists is the Corps of Engineers, which is lodged within the Department of the Army but has jurisdiction primarily over vast engineering projects connected with the clearing of rivers and harbors and the construction of dams for the promotion of navigability, the irrigation of land, and the generation of electric power. The Hoover Commission, which in 1949 made its series of reports on the reorganization of the executive branch of the federal government, recommended without avail the divorcement of this agency from the Department of the Army and the transfer of its functions to other agencies. The engineers resisted the change, and Representative Sabath, Chairman of the House Committee on Rules, commented as follows on the methods of the opposition:

> The Corps of Engineers, United States Army, is doing everything in its power to kill reorganization. It even defies orders of the President. The corps has for years carried on a most flagrant lobbying activity. It has the whole-hearted support of the so-called rivers and harbors bloc, composed mostly of southern members of the House and Senate. The rivers and harbors congress is stanchly behind the corps in its lobbying activities. They, in turn, tie up with the lobby of contractors and with state and local officials. If you own a swamp in the South and are lucky enough to get the Corps of Engineers to drain it for you, you can sell it at any price you can get — the people of the United States pay the bill. The Corps of Engineers has developed one of the most effective lobbies ever operating on Capitol Hill.[31]

Other Government Lobbyists. Various activities of other agencies within the government may likewise be classified as lobbying. During the depression period of the 1930's relief organizations which were spending millions of dollars of government funds advertised the merits of their services by radio, billboards, newspaper handouts, and various other devices which might be expected to create public good will and to bring pressure upon Congress to continue the activities. The movement for a compulsory national health insurance program has had vigorous backing from within the government. One of the task force reports to the Hoover Commission criticized manipulations within the Social Security Administration to secure enlargement of the program of that agency. Said the report,

> The most common manifestation is to give publicity to the material that will popularize the program and lead to its expansion and to play down the material that might raise opposition to it.[32]

31. *Congressional Record,* August 12, 1949, vol. 94, part 9, p. 11386. See also Robert de Roos and Arthur Maas, "The Lobby that Can't be Licked," *Harper's Magazine,* vol. 199 (August, 1949), pp. 21–30.
32. *Congressional Record,* April 6, 1949, vol. 95, part 13, p. A2055.

The accusation may well have been properly made, although it may also have been true that the authors of the task force report, themselves government employees for the purpose of making this report, were in turn lobbying for application of their own ideas quite as much as the Social Security Administration was lobbying for the ideas to which the task force group was opposed.

At any rate, however undesirable it may seem to have pressure put upon Congress by agencies of the government itself, the exercise of some pressure from such sources is almost inevitable. A military agency which is worth its salt for military purposes is likely to have an overabundance of zeal on behalf of its own program. The same is true of social security programs, programs for the benefit of labor, programs for the benefit of business, programs for the benefit of international relations, and so on. The exerting of such pressure marks one of those imbalances within representative government which can never be completely eliminated, however much their elimination may be desired. It may well be that members of the American Medical Association, or the American Federation of Labor, or of the United States Chamber of Commerce have as citizens a right to exert pressure upon Congress which members of the Department of Defense or the Social Security Administration do not possess, even though the latter too are American citizens with voting privileges. We tend to say that the private citizen has a right both to vote and to exert pressure independently, whereas the government worker has the right to vote but not to exert pressure. The reason is that the pressure which he wields is that generated within the government itself. It is pressure which he, as an employee, is obligated to wield not for special purposes such as increased expenditures on the air force, but for the general welfare. Any representative of the Department of the Air Force will of course contend that he advocates increased expenditures on the Air Force for the specific purpose of promoting and protecting the public welfare. Since he is but an employee in one department of the executive branch of the government, however, he is expected to accept a scheme of compromise among executive agencies which the President and Congress have agreed upon. He is not expected to engage in lobbying to upset the balance and exaggerate the confusion produced by inter-agency disagreements.

REGULATION OF LOBBYING

The Federal Regulation of Lobbying Act. In general, Congress is not highly critical of the process by which influence flows from private pressure groups through lobbying personnel to determine the course of legislation. In large part it seems to approve of that process, and to be disturbed principally by practices which tend to corrupt it. Purification of the process was the purpose of the Federal Regulation of Lobbying Act which was passed as a part of the Legislative Reorganization Act of 1946.[33] In recom-

33. For the Lobbying Act see 60 Stat. 839.

mending enactment of the bill the Special Committee on the Organization of Congress emphasized the fact that the bill did not curtail the right of free speech, or freedom of the press, or the right of petition. It did not apply to publishers of newspapers, magazines, or other publications acting in the regular course of business. It did not apply to persons who engaged in no other activity directed toward influencing legislation than that of appearing before committees of Congress. It did not duplicate the requirements of the Corrupt Practices Act, which deals with elections. It did not apply to persons appearing voluntarily without compensation to influence legislation. It did not apply to organizations formed for other purposes whose efforts to influence legislation were merely incidental. The purposes of the statute, rather, was to apply to three distinct classes of lobbyists who were described as follows:

> First. Those who do not visit the Capitol but initiate propaganda from all over the country in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts. This class of persons and organizations will be required under the title, not to cease or curtail their activities in any respect, but merely to disclose the sources of their collections and the methods in which they are disbursed.
>
> Second. The second class of lobbyists are those who are employed to come to the Capitol under the false impression that they exert some powerful influence over Members of Congress. These individuals spend their time in Washington presumably exerting some mysterious influence with respect to the legislation in which their employers are interested, but carefully conceal from Members of Congress whom they happen to contact the purpose of their presence. The title in no wise prohibits or curtails their activities. It merely requires that they shall register and disclose the sources and purposes of their employment and the amount of their compensation.
>
> Third. There is a third class of entirely honest and respectable representatives of business, professional, and philanthropic organizations who come to Washington openly and frankly to express their views for or against legislation, many of whom serve a useful and perfectly legitimate purpose in expressing the views and interpretations of their employers with respect to legislation which concerns them. They will likewise be required to register and state their compensation and the sources of their employment.[34]

These lobbyists were required to register, to state their purposes insofar as influence on legislation was involved, and to list all contributions and all salaries and all expense account reimbursements. Their activities were not outlawed. The act provided no punishment, but merely required lobbyists to file the prescribed information. The strategy of the act was government by publicity. It was assumed that many of the grosser abuses of lobbying would be alleviated merely by the light of publicity.

Registration of Lobbyists. Records of registrations are published quarterly in the *Congressional Record.* For the year 1948 lobbying expenditures running to $6,700,000 were reported.[35] As of August, 1949, 1,900 lobbyists

34. *Legislative Reorganization Act of 1946,* Senate Report No. 1400, 79th Cong., 2d sess., p. 27.
35. Baltimore *Sun,* March 30, 1949.

had been registered.[36] During the first quarter of 1949, expenditures of more than $2 million were reported. Some of the larger expenditures were listed and analyzed as follows:

	Expended
Committee for Constitutional Government	$149,066
National Association of Electric Companies (against Taft-Hartley [repeal])	136,509
National Physicians' Committee	130,969
American Medical Association	115,248
General Electric Co.	91,075
National Association of Real Estate Boards	39,344
Association of American Railroads	33,000
Chamber of Commerce of United States	28,000
Southern Pines Industry Committee	36,377

The following is a break-down of 258 groups which spent hundreds of thousands in the first quarter of 1949:

Business (building, real estate, finance, food and agricultural products, oil, gas, mining, power, communications, transportation)	$952,421
Foreign-policy groups	184,020
Farm groups	111,079
Reclamation, rivers and harbors groups	102,000 [37]

Individual registrations of lobbyists include activities from the cradle to the grave, from diaper services [38] to the services of undertakers. Individual incomes are listed all the way from zero up to figures indicating retainers of as much as $36,000 annually.[39] The nature of the information given by registrants is indicated by the following items which are summarized from a published list in the *Congressional Record*.[40] A representative of the National Association of Manufacturers reported for the third quarter of the year a salary of approximately $2,000 and expenses reimbursed by employers of approximately $100. The expenses were said to have been paid to various restaurants, hotels, taxicabs, and railroads. Activities had been those of travelling and attending meetings to discuss general conditions in Washington of particular interest to business and industry. Proposed legislation supported or opposed included "all bills affecting the following subjects: national labor policy, portal-to-portal wage claims, tax laws, reduction of federal expenditures, control of atomic energy, federal subsidi-

36. Representative Sabath, *Congressional Record,* August 12, 1949, vol. 95, part 9, p. 11386.
37. *Ibid.*, p. 11386.
38. See registration of Stanley I. Posner, with fees of $1249.98 for the National Institute of Diaper Services et al., and expenses of $444.99, *Congressional Record,* October 19, 1949, vol. 95, part 11, p. 15139.
39. See registration of Gerard D. Reilly, employed by General Motors Corporation, *ibid.*, p. A7169.
40. See *Congressional Record,* November 17, 1947, vol. 93, part 8, pp. 10524–64.

zation of research, patents and trade marks, wartime control powers, and revision of the SEC and RFC Act.

One lawyer filed three separate reports; as a representative of Unemployment Benefit Advisors, Inc., he professed interest in "all legislation affecting social security benefits and contributions." As a representative of the National Tax Equality Association his firm was retained "to prepare and present to congressional committees legal aspects of tax advantages enjoyed by cooperatives." As employed by the National Rehabilitation Association he was interested in "any legislation affecting the vocational rehabilitation program."

Another representative of the National Association of Manufacturers indicated an interest in "all legislation affecting industry, such as legislation relating to national labor policy, taxation, public expenditure, industrial control, social security, research, patents, and investments." An employee of the National Education Association supported "any and all legislation designed to strengthen public education in all of its areas." One man registering for the Citizens Committee on Displaced Persons professed interest in H.R. 2910, the proposed Emergency Temporary Displaced Persons Admissions Act.

An employee of the Brotherhood of Locomotive Engineers professed interest in "legislation directly and indirectly affecting the interests of labor generally, employees of carriers under the Railway Labor Act, and particularly the interests of various classes and crafts of railway employees represented by the Brotherhood of Locomotive Engineers." Many representatives of other unions filed similar statements. Typical also was the statement of an attorney for the Colorado Railroad Association who expressed interest in "legislation affecting all railroads operating in and have trackage in the state of Colorado." A representative of the Ohio Chamber of Commerce expressed interest in "legislation dealing with taxation, social security, labor relations, and other matters of interest to our organization." The purpose of another lobbyist was indicated by the name of his employer, the National Committee to Abolish the Poll Tax. Opposition to cooperatives appeared again in the registration of an employee of United States Business Organizations, Inc., who was interested in "equality of taxes between private enterprises and cooperatives, tax reduction, public expenditures, government corporations, labor relations, social security." A representative of the Townsend National Recovery Plan, Inc., was in Washington as an advocate of the bill to establish the Townsend Plan for the distribution of funds to aged people. Another employee of the same organization used her report itself as an instrument of propaganda. She described her legislative interest as follows:

> To provide every adult citizen in the United States with equal basic federal insurance, permitting retirement with benefits at age 60, and also covering total disability from whatever cause for certain citizens under 60; to give protection to widows and children; to provide an ever-expanding market for goods and services through the payment and distribution of such

> benefits in ratio to the nation's steadily increasing ability to produce, with the cost of such benefits to be carried by every citizen in proportion to the income privileges he enjoys.[41]

So the list of reports proceeds, in infinite variety. A representative of the National Lumber Manufacturers' Association announced frankly his purpose to "oppose any legislation inimical to the interests of the lumber industry and support any legislation which would be helpful to it." An employee of the Board of Christian Education of the Presbyterian Church announced her purpose as "lobbying in the interests of social legislation on which the Presbyterian General Assembly has taken action." A representative of the International Longshoremen's and Warehousemen's Union, CIO, professed "to support all legislation of interest to American workers and longshoremen, warehousemen and maritime workers specifically, oppose undemocratic legislation." An employer of the Oilworkers International Union, CIO, grandiloquently announced that his purpose was to "support all legislation favorable to the national peace, security, democracy, prosperity, and general welfare. Oppose legislation detrimental to those objectives." His report sounds much like that of a representative of the National Board of the Young Women's Christian Association, who professed interest in "legislation related to international security, social and economic justice, education, health, and civil liberties." An employee of the National Canners Association cautiously announced his task as that of "routine following through *Congressional Record* and newspapers, and otherwise keeping informed on legislation affecting the canning industry." The reader suspects concealment of basic purpose when a representative of the State Rights Association, Houston, Texas, announces his interest in "legislation to preserve and promote the rights of the state under our system of government, to return to the states such normal functions as they should rightfully assume, to restrict federal agencies to federal functions, and to equalize taxation in accordance with state laws."

Perhaps the most literal and the most garrulously complete of the reports was that of an employee of the American Legion. During the period in question he had received $201.63 salary semi-monthly "less withholding tax." He had incurred incidental expenses of $17.58, and travelling expenses of $110.88. His legislative interest was stated as follows:

> The American Legion and all veterans of World War I and World War II and their dependents on all matters affecting their care, their rehabilitation, hospitalization, re-education and housing; and all matters affecting the general welfare of our country with regard to national events; Americanization, included in which is opposition to all subversive activities and particular attention to our immigration and naturalization laws; child welfare; not only for children of veterans but for all children; aid and assistance to veterans in agricultural development; matters dealing with our foreign policy and foreign relations, the development of sound civil aviation programs and policies; the development of sound and progressive programs for the employment and reemployment of veterans in civil pursuits and in civil service; legislation which

41. *Ibid.*, pp. 10542–43.

> would eliminate all improper discriminations and be of benefit to the men and women who are still in our armed services; and all other matters included in the mandates and program of the American Legion as adopted and approved by the National Convention of the American Legion and/or by its National Executive Committee which are the ruling and policy making bodies of the American Legion.[42]

Effects of the Registration Requirement. The requirement of registration and reporting has resulted in an accumulation of material on lobbying which was never before available to students of the subject. It is doubtful, however, if members of Congress themselves have learned as a result of it much that they did not previously know. In general, the questions asked are so vaguely stated as to permit partial concealment of purpose, activity, and expenditure. Representative Sabath has said of the lobbyists registering under the statute that

> Very few of them give the real facts and information as to how much money they are receiving or how many corporations they represent; in fact, the information they give is of very little value to the members of this House.[43]

There is reason for believing that in spite of the steady growth of the list of lobbyists a great many lobbying activities are carried on by persons who ought to register but who have not done so.

In any event, the publicity has done little to restrain the practice of lobbying. An illustration is provided by President Truman's denunciation of the lobby against public housing in his message to Congress on June 30, 1947.

> One of the most stubborn obstacles in the way of any constructive housing program has been the opposition of the real estate lobby. Its members have exerted pressure at every point against every proposal for making the housing program more effective. They have constantly sought to weaken rent control and do away with necessary aids to housing. They are openly proud of their success in blocking a comprehensive program.
>
> This group has sought to achieve financial gains without regard to the damage done to others. It has displayed a ruthless disregard of the public welfare.
>
> It is intolerable that this lobby should be permitted by its brazen operations to block programs so essential to the needs of our citizens.[44]

That neither the administration of the statute nor the President's message had had any important effects in restraining the real estate lobby was indicated approximately two years later by President Truman's letter on the subject to Speaker Sam Rayburn, in which he included the following:

> I have been shocked in recent days at the extraordinary propaganda campaign that has been unleashed against this bill by the real estate lobby. I do not recall ever having witnessed a more deliberate campaign of misrepre-

42. *Ibid.*, pp. 10555–56.
43. *Congressional Record,* August 12, 1949, vol. 95, part 9, p. 11386.
44. *Congressional Record,* June 30, 1947, vol. 93, part 6, p. 7916.

> sentation and distortion against legislation of such social importance to the public welfare.
>
> The propaganda of the real estate lobby consistently misstates the explicit provisions of the bill, consistently misrepresents what will be the actual effect of the bill, and consistently distorts the facts of the housing situation in the country.[45]

In the summer of 1949 an attempt was made to secure a thorough investigation of lobbying by joint action of the two houses of Congress. Legislators sought adequate information about the activities of private lobbyists, and also about lobbying from within the federal government. Some of them showed concern about the representation of particular special interests on the floor of Congress itself, but they had little idea of how to cope with the problem. When the cooperation of the Senate could not be secured, the House of Representatives, acting independently, created a Select Committee on Lobbying Activities which held illuminating hearings in 1950.

CONCLUSION

It can be said in conclusion that lobbying by pressure groups operating upon Congress is likely to continue on a large scale; that Congress expects and to some extent wishes it to continue; and that in some degree it ought to continue. It has a place in our system of government insofar as it is an effective device for making the will of the people known to Congress, and insofar as it equips legislators with information in terms of which they can exercise sound judgment. The grosser methods of exerting pressure need to be eliminated. The sources of the pressure need to be disclosed. There needs to be within the government, and preferably within Congress, machinery for checking the information and analyzing the propaganda of pressure groups in order to correct distortion and keep Congress from being misled. More adequate machinery is needed for assessing the popular representation claimed by the manipulators of power within the lobby groups. The protection given the congressmen must be such as to enable them in critical instances to exercise their own judgment in the public interest in spite of the sometimes tremendously powerful impact of minority pressure groups. All this is merely saying, however, that pressure groups, like other phenomena, need to be digested into our social system and utilized in their proper relations to the whole. They are instruments of stability as well as of change. The National Association of Manufacturers, the United States Chamber of Commerce, the American Medical Association, and even such oftentimes dissenting groups as the American Federa-

45. *New York Times*, June 18, 1949. See Belle Zeller, "The Federal Regulation of Lobbying Act," *Congressional Record* (temporary daily edition), March 8, 1950, pp. A1879–88; and Edgar Lane, "Some Lessons from Past Congressional Investigations of Lobbying," *ibid.*, Feb. 20, 1950, pp. A1257–61. See also W. Brooke Graves, *Administration of the Lobby Registration Provision of the Legislative Reorganization Act of 1946*, written in 1949 for the Legislative Reference Service, Library of Congress, and published, 1950, as a committee print by the House Select Committee on Lobbying Activities. See also the hearings of that committee, 81st Cong., 2d sess.

tion of Labor and the CIO, are frequently lined up in defense of the existing body of law and against its expansion or modification. Lobbyists, in other words, are sometimes on the side of stability and sometimes on the side of change. Individual pressures at individual times must be appraised in terms of what they stand for in particular situations. They are good or bad as they provide for the more or less effective utilization of the dynamics of our society for achieving the public welfare.

References

Donald C. Blaisdell, *Government Under Pressure* (Public Affairs Pamphlet No. 67, 1942).

———, *Economic Power and Political Pressures* (Government Printing Office, 1941).

Robert A. Brady, *Business as a System of Power* (Columbia University Press, 1943).

Stuart Chase, *Democracy Under Pressure; Special Interests vs. Public Welfare* (Twentieth Century Fund, 1945).

Kenneth G. Crawford, *The Pressure Boys; The Inside Story of Lobbying in America* (J. Messner, 1939).

Harwood L. Childs, *An Introduction to Public Opinion* (Wiley, 1940).

Dorothy Detzer, *Appointment on the Hill* (Holt, 1948).

Leonard W. Doob, *Public Opinion and Propaganda* (Holt, 1948).

W. Brooke Graves, *Administration of the Lobby Registration Provision of the Legislative Reorganization Act of 1946* (Government Printing Office, 1950).

E. Pendleton Herring, *Group Representation before Congress* (Johns Hopkins Press, 1929).

———, *Public Administration and the Public Interest* (McGraw-Hill, 1936).

V. O. Key, Jr., *Politics, Parties and Pressure Groups* (Crowell, 2nd ed., 1947).

Harold D. Lasswell, *Democracy Through Public Opinion* (Banta, 1941).

Avery Leiserson, *Administrative Regulation: A Study of Representation of Interests* (University of Chicago Press, 1942).

Walter Lippman, *Public Opinion* (Harcourt, Brace, 1929).

Wesley McCune, *The Farm Bloc* (Doubleday, Doran, 1943).

Dayton D. McKean, *Party and Pressure Politics* (Houghton Mifflin, 1949).

Peter H. Odegard, *Pressure Politics; The Story of the Anti-Saloon League* (Columbia University Press, 1928).

Charles A. Pearce, *Trade Association Survey.* Monograph No. 18 Investigation of the Concentration of Economic Power (76th Cong. 3d. sess., Senate Committee print, 1941).

M. Louise Rutherford, *Influence of the American Bar Association on Public Opinion and Legislation* (Foundation Press, 1937).

E. E. Schattschneider, *Politics, Pressures and the Tariff* (Prentice Hall, 1935).

———, *The Struggle for Party Government* (University of Maryland, 1948).

Belle Zeller, *Pressure Politics in New York* (Prentice Hall, 1937).

11

The Enactment of Statutes

The final enactment of a statute comes at a point far distant from the time when someone gets the feeling that "there ought to be a law." The idea must find its way into the stream of popular desire, or at any rate the desire of powerful groups and individuals. It must secure sponsorship among congressional leaders. It must work its way along the meandering course of the legislative process at the risk of being blocked altogether, interminably delayed, or fundamentally modified. To illuminate the process of enactment this chapter will first outline briefly the several stages through which a bill in Congress must go on its way to achieving the status of law. It will then illustrate at length by presenting the history of the enactment of a particular measure, one which was still in force without subsequent important change at the time when this chapter was written.

THE COURSE OF ENACTMENT

The Origin and Introduction of Bills. Bills have their origin in the desire of one or more persons to have a law on a given subject. The content of a bill may conceivably reflect only the wishes of a particular legislator or the wishes of one of his constituents for whom he acts to the extent of introducing the bill in his own name. But if the bill has any prospect of enactment, or even of consideration beyond the stage of introduction and reference to a committee, it must have the approval of a great many people. It must have interest and pressure behind it. It must be thought to offer benefit to particular groups or to the country as a whole.

The bill may conceivably be drafted by the legislator who introduces it. He is likely to have aid from the legislative counsel which Congress provides, however, or from the counsel of the group desiring to have the bill presented. In recent years, as the executive branch of the government has assumed increasing responsibility for the legislative program, large numbers of bills have been drafted in federal agencies and submitted to members of Congress for introduction.

The process of introduction is simple.[1] Excepting bills for raising revenue, which must start in the House of Representatives, bills on any subject may be introduced in either house. In the House of Representatives the member who sponsors a bill merely drops it into a box — known as the "hopper" — at the Speaker's desk. In the Senate the sponsor introduces it from the floor, usually during what is called the morning hour and usually without discussion.

Committee Consideration. The presiding officer in either house refers all bills to the appropriate committees, though often the contents of a bill virtually dictate the choice of the committee. Agricultural matters, for example, will go to the Committee on Agriculture. Money matters will go to the Committee on Banking and Currency. Military matters will go to the Committee on Armed Services. Sometimes, however, a bill cuts across jurisdictional lines. One dealing with farm labor, for example, might go either to the Committee on Agriculture or to the committee which has jurisdiction over labor matters, which in the Senate is the Committee on Labor and Public Welfare and in the House is the Committee on Education and Labor. In matters of doubt the Parliamentarian of the House or the Secretary of the Senate usually determines the reference. If one committee is known to be more hostile or more friendly to the bill than the other, the attitude of the presiding officer toward the bill may determine the choice.

If the bill is an important one the committee announces public hearings, which are usually held before a subcommittee. It is usually at these hearings that the lengthy and detailed consideration of the bill takes place, with both its friends and its opponents appearing and stating their positions. If the matter is generally regarded as of great public interest and as requiring immediate action, the period for hearings may be limited to stated days and the testimony of each person may also be limited in time. There may, on the other hand, be no such limit. Friends of the bill seek to demonstrate the necessity for its enactment and sometimes argue for strengthening it in particular ways. Opponents present evidence to show why it should not be passed or why, in any event, it ought to be amended in particular ways before enactment. This process may continue for several days or even for weeks, though usually only during the morning hours, so that members of Congress may attend to business on the floor in the afternoon. Interested persons and representatives of the press attend the hearings and spread information about proceedings.

At the close of the hearings the subcommittee recommends to the full committee that the bill be reported favorably, or that it be rewritten or reported with amendments, or that it be pigeonholed — that is, not reported at all. If the committee fails to report the bill, nothing further happens except in the improbable event that the house demands its submission. If

1. For an account of the course of a bill through Congress see George H. E. Smith and Floyd M. Riddick, *Congress in Action* (Washington, D.C.: National Capitol Publication, 1948). See also Carl Elliott, "How a Bill Makes Its Way Through the Legislative Mill," *Congressional Record,* March 28, 1949, vol. 95, part 13, p. A1786.

the committee recommends enactment of the bill, it issues a favorable report explaining the bill and summarizing the hearings. The report is likely to run to only a few printed pages, but it may run to several dozen. It is accompanied by printed copies of the hearings, which may run to several hundred or even several thousand pages.

Consideration on the Floor. When the committee makes its report, the bill goes on the calendar of the house to which the committee belongs. In theory its placement on the calendar determines when, with respect to other bills on the calendar, this particular bill will be considered on the floor. In actuality more bills are reported than have any prospect of consideration. Because some are regarded as more important than others, machinery has to be devised for determining priority of consideration. In the House of Representatives the Committee on Rules may decide whether a bill shall be called up, and its will prevails unless at least half the total membership votes to bring up a bill which the Rules Committee is unwilling to report. In the Senate the policy committee of the majority party determines such matters with somewhat less formality.

Debate is usually opened by the chairman of the committee which reported the bill or by some other member of the committee who is interested in securing its enactment. The first speaker usually outlines the character of the bill and tells why he thinks it should be enacted. Copies of the bill and of the report thereon are in the meantime placed on the desks of the members of the house, and copies of the printed hearings are also made available. From the debate and from the report and the hearings, and from other sources including newspapers and lobbyists, the members of the house are supposed to learn enough about the bill to be able to decide whether or not to vote for its enactment.

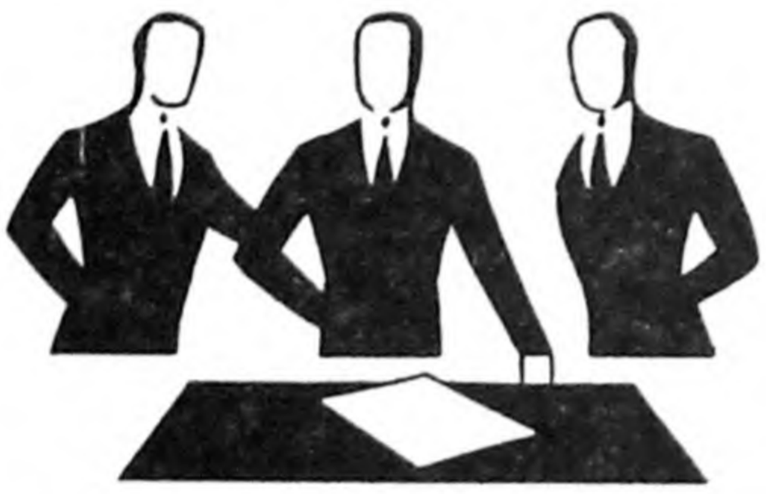
If the bill is important and at the same time highly controversial, debate may continue for several days. In the House of Representatives it is likely to be limited to a specified period, but in the Senate, which has only ninety-six members as against the four hundred thirty-five in the House, discussion may continue as long as any considerable number of persons have any desire to speak on the subject. The text of the debate appears each day in the *Congressional Record*. The daily editions of that publication are eventually revised and brought out in bound volumes so that a permanent record is preserved. It is possible, therefore, to follow the debate in either house on any bill by turning to the *Congressional Record*.

Debate on a bill usually consists not only of support and opposition but also of various attempts to change its provisions by amendment. Action of almost every kind has the support or opposition of various pressure groups which oftentimes include agencies of the government itself. The proposal of amendments may represent bona fide attempts to strengthen the bill, or they may be calculated to weaken it in particular respects. It sometimes happens that opponents who see no way of defeating a bill in the form in which it was reported will succeed in loading it with unfavorable amend-

Bill is introduced in House and referred to appropriate committee.

It may be reported out with or without change — or it may be shelved.

Rules ("traffic") Committee may delay bill, but this power is now limited.



Senate committee considers bill, may shelve it or report it out to the floor.

House then debates the bill. If passed (with or without revision), it is sent to Senate.

Chairman of original committee may bring bill to floor of House.

If Senate passes bill differing from House bill, both versions go to Conference Committee.

Conference Committee may adopt a compromise. This is submitted to House and Senate.

If Congress accepts compromise, the bill goes to President.

If President signs, bill becomes law.
If he vetoes, Congress can override his veto by two-thirds majority.

THE COURSE OF A BILL THROUGH CONGRESS

ments with the result that some of its original supporters may in the end turn against it, thereby bringing about its defeat.

It seems improbable that many legislators are greatly influenced in any direct manner by what is said in debate. Some of them know something about the bill and have their minds made up even before it is reported. Some rely for advice in the matter upon party leadership. Others find it necessary to yield to the insistence of pressure groups. Therefore, while some members insist on getting their positions recorded by speaking at length, most of their colleagues may be in their offices working on other measures, seeing constituents, or performing various other duties which fall to the lot of members of Congress. The impression given to observers from the galleries, therefore, is oftentimes that of lack of interest on the part of legislators in the measure which is up for consideration. That impression is usually entirely wrong. The bill gets very serious attention, but it gets it in part through other channels than those of formal debate.

The bill eventually comes to a vote. Depending on various circumstances and on the desires of members, action may be taken by a voice vote, by a rising vote, by a teller vote whereby the count is made by tellers rather than by the presiding officer, or, finally, by a recording of the yeas and nays.

Consideration in the Other House. If the bill is passed by the house in which it is introduced, it goes then to the second house for action. There it is again referred to a committee. That committee may also hold hearings on the bill, which may be more extensive or less extensive than those held by the committee of the first house. If the bill is one which has the support of the executive branch of the government it may conceivably have been introduced in both houses at the same time. In that event, committees of each house may have held hearings before either house passes the bill. When it is passed by one of them, it thereafter carries the number given to it by that house and is substituted in the other house for the bill originally introduced there. The hearings originally held by the second house, however, may well take the place of additional hearings on the bill as passed by the first house, although differences brought about by amendment may require additional committee consideration.

If the committee of the second house reports the bill favorably, it goes on the calendar and is eventually brought up for consideration and debate after the fashion already described. It may be passed by the second house in a form somewhat different from that in which it passed the first. The first house may accept the changes; if not, a conference committee is set up consisting of members appointed by the presiding officers of the two houses. The members usually consist of the leading advocates of the bill in each house. If the conference committee is able to reach a compromise satisfactory to itself, it then reports it to the two houses. If both houses accept the compromise, the bill is ready for the next step. If not, it goes back to the conference committee for further consideration.

If and when agreement is reached as to the exact form of the bill, it is

signed by the presiding officers of the two houses and sent to the President of the United States. The bill becomes a law if and when it receives the President's signature. It also becomes a law if, while Congress continues in session, he holds it for a period of ten days, Sundays excepted. If the President does not approve the bill he returns it to the house of its origin with a statement of his objections, which is called a veto message. It may even yet become a law if each house again passes it by a two-thirds vote. If adjournment of Congress comes within the ten day period the President may escape the necessity of sending a veto message by holding the bill beyond the adjournment date, in which case it does not become a law.

Such, in brief, is an account of the more important steps involved in the history of a bill from the time of its inception to the time when it becomes a law. Various intervening and collateral steps are also involved in the process. The bill runs the risk of being sidetracked at any point. The committee to which it is initially referred, for example, may immediately pigeonhole it. That is, it may take no action whatsoever. After holding hearings, it may still decide against reporting the bill. It may change the bill beyond recognition. After the bill is reported and on the calendar it may never be brought up for consideration. If it is debated, it may be rejected altogether or changed beyond recognition. If it is passed by the first house and sent to the second, it must there clear all the hurdles which it had to clear in the first house. If it goes to conference committee, the committee may be unable to agree, or one or both houses may refuse to accept the conference report. If the President vetoes the bill, Congress may not pass it over his veto. So it is that uncertainty prevails until the measure has the President's signature, or until it has become a law by the renewed action of both houses after the signature has been refused. In spite of all these obstacles, a tremendous amount of statute material does find its way through the prescribed procedure and become a part of the law of the land. The process of enactment is illustrated in the following pages by an account of the way in which the Employment Act of 1946[2] came into being.

ENACTMENT OF THE EMPLOYMENT ACT OF 1946[3]

Background. In 1944, as the prospect of victory in World War II began to appear imminent, leaders in many fields began to discuss ways and means of returning to the operation of a peace-time economy. Members of Congress, various agencies in the executive branch of the government,

2. 60 Stat. 23.

3. Although in the revision of this chapter the author has had the benefit of reference to Stephen K. Bailey, *Congress Makes a Law: The Story Behind the Employment Act of 1946* (New York: Columbia University Press, 1950), it has not been possible to expand the chapter to include much of the additional material which Professor Bailey has presented. Readers are therefore referred to that book for the unabridged account of a fascinating segment of legislative experience. For briefer accounts of the histories of other bills see James M. Burns, *Congress on Trial* (New York: Harpers, 1949), Chapter V.

and private organizations representing business or labor or some composite of interests offered proposals for averting depression and large scale unemployment during the period of transition. Both houses of Congress organized special committees to deal with problems of post-war planning, but various standing committees and subcommittees were also concerned with the subject. Business and the friends of business in Congress were concerned about the difficulties in the way of smooth transition from production of war supplies for the government to production of goods for sale to private purchasers. Labor groups and others concerned about the broader aspects of planning the national economy stressed the necessity of maintaining a high level of employment for workers, who in turn as purchasers would help to maintain the prosperity of private business. Specific aid for business reconversion from war to peace was easier to visualize than planning for the economy as a whole, and such aid was backed by powerful lobbies of conservative interests and supported by conservative groups in Congress. Legislation for that purpose was therefore enacted during 1944, leaving the already much discussed problem of maintaining employment for solution at a later date.

During the presidential campaign of 1944 both presidential candidates gave lip service to the idea of full employment, but whereas the Republican candidate, Thomas E. Dewey, dealt with it only in generalities, President Roosevelt and the then Vice President, Henry Wallace, talked confidently of a government program which would provide a minimum of 60,000,000 jobs, a total never before achieved in time of peace. When the Democrats won the election, liberal groups in Congress and in executive agencies began consolidation of plans to enact full employment legislation.

A full employment bill was drafted during the latter part of 1944 under the sponsorship of Senator James E. Murray, of Montana,[4] who as chairman of the war contracts subcommittee of the Senate Committee on Military Affairs had tried unsuccessfully to link full employment provisions with provisions for the reconversion of business. Much of the work was done by or under the supervision of Bertram Gross, who headed the staff of that subcommittee. Gross called into consultation representatives of the Bureau of the Budget, the Bureau of Labor Statistics, and various other government agencies and private groups who could advise on the economic and political strategy of getting legislation enacted which would promote employment. The drafters attempted to translate into clear English the heavy terminology of professional economists and observed the strategic rule that "a bill must be made to appeal to the widest possible group of potential supporters."[5] Senator Murray won added support for the bill by asking three other senators, Wagner, Thomas, and O'Mahoney, to join with him as co-sponsors. He introduced the bill on January 22, 1945, as sponsored by himself and his three colleagues. It was called

> a bill to establish a national policy and program for assuring continuing full employment in a free competitive economy, through the concerted efforts of

4. Bailey, *op. cit.*, Chapter 3.

5. *Ibid.*, p. 46.

industry, agriculture, labor, state and local governments, and the federal government.[6]

At Senator Murray's request the bill was printed in the body of the *Congressional Record* along with a series of questions and answers explaining the bill and with a further oral statement concerning it. The bill was referred to the Senate Committee on Banking and Currency of which Senator Wagner was Chairman, and was given the number of S.380. On February 15 a similar bill was introduced in the House of Representatives by Representative Patman and was referred to the Committee on Expenditures in the Executive Departments with the number H.R.2202.

The Propaganda Background. Although the Senate bill was introduced on January 22, hearings before a subcommittee of the Senate Committee on Banking and Currency did not begin until July 30, partly because the committee was engaged in work on other important bills. In the meantime a great deal of discussion and preparation for support of the bill took place against a background of swiftly moving events. The military struggle in Germany had come to an end. It was thought possible that the end of war with Japan was in sight. President Roosevelt had died, leaving the headship of the executive branch of the government to his Vice President, Harry Truman. The rapidly changing corps of subordinate officers began to concern itself anxiously with the return to peacetime conditions. Henry Wallace, now Secretary of Commerce, continued to advocate a program to provide some 60,000,000 jobs in time of peace. Labor groups and liberal groups of various kinds showed enthusiasm for the ideal but a considerable amount of caution about support of a particular program. Various business interests, on the other hand, showed themselves primarily concerned with breaking the grip of government controls over business and restoring business leadership in the handling of economic affairs.

Senator Murray and his co-sponsors of the bill knew that they had an uphill fight ahead of them. Bertram Gross and the staff which had aided in the preparation of the full employment bill were transferred from Senator Murray's subcommittee to Senator Wagner's jurisdiction where they continued to give aid. They collected a vast amount of economic data for the use of the committee. They drafted speeches, articles, letters, press releases, memoranda, and reports for friends of the bill in Congress and in various governmental agencies. They sampled the opinion of business groups with respect to the bill to enable the sponsors to utilize its friends and beat the arguments of its enemies. By various means they got publicity for the bill through the press and radio.[7] Various private groups, including some but not all labor organizations and farm organizations, and political organizations such as the Union for Democratic Action, engaged in propaganda and lobbying on behalf of the bill. A number of liberal Republicans showed interest in the campaign, and were invited to allow use of

6. *Congressional Record*, Jan. 22, 1945, vol. 91, part 1, p. 377.
7. See Bailey, *op. cit.*, Chapter 4.

their names as co-sponsors, thereby creating an atmosphere of non-partisanship.

Senate Committee Hearings. In the form in which it was referred to the Senate Committee on Banking and Currency, the full employment bill declared it to be the policy of the United States to foster free competitive enterprise and the investment of private capital in trade and commerce, and in the development of the natural resources of the United States. Having thus done lip service to a basic American dogma, it declared further that all Americans able to work and desiring to work had the right to useful, remunerative, regular and full-time employment, and proclaimed it the policy of the United States to assure the existence at all times of sufficient employment opportunities for people who had finished schooling and who did not have full-time housekeeping responsibilities. By way of machinery the bill provided for what was called a budgetary system to appraise not only the fiscal operations of the federal government but also the operations of the entire national economy. Studies of the total of national economic problems were to be submitted to the President, who would then make recommendations to Congress whereupon Congress would work out a program which would bring about the desired full employment. Although the bill was far from specific, its purpose clearly included the making of huge federal expenditures for the stimulation of enterprise as during the earlier New Deal period if such expenditures proved to be necessary.

The Committee on Banking and Currency consisted of twenty senators under Senator Wagner's chairmanship. The subcommittee chosen to hold hearings on the bill consisted of ten members likewise under his chairmanship. The hearings were held over eleven days within the calendar period from July 30 to September 1 inclusive. The published hearings ran to a total of twelve hundred and fifty-nine pages.[8] Preliminary testimony consisted of statements carefully prepared by experts and delivered by five senators and two representatives who were supporters of the bill. The other witnesses included government officials, university professors, and representatives of business, labor, agriculture, veterans, education, and other groups. The sponsors saw to it that testimony was offered by large numbers of witnesses who were favorable to the bill. Opposition to the bill seemed not at this time to have been sufficiently consolidated to bring out more than a small minority of hostile witnesses. The subcommittee, dominated primarily by members who were favorable to the bill, treated its friends with deference and subjected its critics to sharp cross-examination.[9]

Although the atmosphere of the hearings was one of general friendliness to the bill, witnesses differed widely as to the extent of the right of people to employment, the possibility that full employment could be achieved at all, and the methods of promoting employment. Witnesses from different

8. *Full Employment Act of 1945.* Hearings before a subcommittee of the Senate Committee on Banking and Currency on S.380, 79th Cong., 1st sess.
9. Bailey, *op. cit.*, pp. 108–09.

fields of activity had differing ideas and advice, geared as a rule to what they believed to be best for their own particular groups. The hearings had the effect of clarifying some ideas and of giving additional publicity to the campaign for enactment of the bill.

The Committee Report. When the hearings closed on September 1, the subcommittee was in disagreement as to the exact form in which the bill should be reported, and a minority was pretty generally hostile to the bill in any form. On September 6, as if to provide momentum for the bill, President Truman delivered to Congress a message in which he called for "a national reassertion of the right to work for every American citizen willing and able to work." The subcommittee debated the bill at a number of executive sessions, and finally made a majority favorable report to the full committee. The full committee was for a time almost evenly divided between reporting the bill to the Senate approximately as it stood and reporting it only after drastically restricting it by amendments. It was finally agreed by a vote of thirteen to seven to report it favorably with certain minor amendments and with some simplifying revision of language.

As presented to the Senate the majority report contained a statement of the economic situation, an explanation of the bill, and a summary and appraisal of the testimony at the hearings.[10] The names of forty organizations were presented as a partial list of those who had endorsed the bill. An attempt was made to portray all opposition to the bill as ultra-conservative, linking it with statements by the president of the National Association of Manufacturers, the vice president of the Guaranty Trust Company of New York, and the executive vice president of the Illinois Manufacturers Association. The points made in opposition were listed as follows:

a. Continuing full employment is impossible under our economic system.
b. Continuing full employment would be undesirable.
c. The government's responsibility should be limited to the relief of destitution.
d. The right to an opportunity for employment should not be written into law.
e. No need for action because we face a new era of prosperity.
f. The policy on federal investment and expenditure would mean endless deficit financing.
g. The national production and employment budget calls for impossible forecasts.
h. Full employment without measures that would contribute to economic warfare is utopian.
i. Action on the bill should be delayed.
j. There is no assurance of proper congressional action within the framework of the Full Employment Bill.

The report submitted answers to the several points.

The majority report ran to eighty-three pages. Attached to it as Part II was an eight-page statement of what were called minority views as sub-

10. Senate Report No. 583, 79th Cong., 1st sess.

mitted by Senator Radcliffe for himself and six other members of the Committee on Banking and Currency. This minority approved the bill in part and disapproved in part. It declared that

> In spite of the protests of the authors of the bill, there can be no doubt in our opinion that the bill adopts public spending as an ultimate panacea for all economic troubles. It is based on the assumption that if we are not ingenious enough to suggest something else, we can always fall back on unlimited public spending. That assumption is false and dangerous.[11]

Certain of the minority senators, therefore, urged qualification of clauses dealing with federal expenditures and the inclusion of an amendment that would provide for added taxation to prevent expansion of the public debt for the purpose of increasing employment.

Debate in the Senate. On September 24, 1945, two days after the bill was reported, Senator Barkley, the majority leader in the Senate, moved formally that the Senate proceed to consider Senate Bill 380, the so-called Full Employment Bill. He stated that he did so without intending to have the bill taken up on that day but merely in order to make it the unfinished business so that it could be taken up for consideration on the day following. The motion was agreed to. The formal action of the Committee on Banking and Currency had been that of reporting the bill with an amendment to strike out all after the enacting clause and to insert a new draft. This new draft was printed in the *Congressional Record* at this point.[12]

On September 25 Senator Wagner, acting on the basis of his chairmanship of the committee and the subcommittee which had considered the bill, addressed the Senate, asking that he be permitted to complete his statement without interruption. He summarized the contents of the bill and indicated the wide range of support for it, both in connection with the hearings that had been held and through evidence in the press and other sources. He indicated the breadth of its support in the Senate by pointing out that the already numerous sponsorship of the bill had been enlarged to include representatives of the minority. The sponsors now included Murray of Montana, Thomas of Utah, O'Mahoney of Wyoming, Morse of Oregon, Tobey of New Hampshire, Aiken of Vermont, and Langer of North Dakota. He referred to modifications in the bill which had resulted from amendments proposed by Republican members of the committee. He quoted from a speech of Thomas E. Dewey, made as a Republican presidential candidate, which seemed to support the kind of measure now proposed. He scoffed at the critics of the bill, particularly those who argued that relief would be cheaper than the provision of employment and who took depression for granted. Those people, he declared, had no faith in the vitality of our free enterprise system. They had no confidence in the ability of the American people through their government to win the war against unemployment. Fifteen million soldiers, sailors, and

11. *Ibid.*, Part 2, p. 4.
12. *Congressional Record*, Sept. 24, 1945, vol. 91, part 7, p. 8917.

airmen wanted opportunities for useful employment, "and these apostles of defeatism offer not jobs, but relief." The bill, he contended, provided a common meeting ground for all who sincerely believed in full employment and the right to work. He closed with the following appeal:

> Let those who are afraid that continuing full employment cannot be achieved satisfy their doubts and join with the supporters of this proposed legislation in an all-out effort to see that it is achieved.
>
> Let those who are afraid of the effects of full employment cast aside their fears.
>
> Let those who offer relief instead of jobs set themselves a higher and nobler goal.
>
> Let us join together and enact this historic legislation without delay and without impairment.
>
> Let us therefore inspire business, agriculture, labor, and, above all, the men and women who fought and won the war, with a new confidence in America's ability to fight and win the peace.[13]

Upon completion of Senator Wagner's formal address Senator Taft insisted upon an explanation of a section of the bill which read,

> All Americans able to work and desiring to work are entitled to an opportunity for useful, remunerative, regular, and full-time employment.

Was that provision intended to confer a legal right to a job? What was it exactly to which a man was entitled? Senator Wagner replied that the answer had been given time and again before the committee. Taft thought that it ought to be stated on the floor of the Senate. To him the term was ambiguous, and he insisted that the exact nature of the proposal be defined. Did the Senator mean to say that a man who could not get employment otherwise could go to the federal government and say "Give me a job"? Wagner said "No." Was it not a legal right that the Senator proposed to confer? Wagner replied, "No; it is not a legal right in the sense that he can sue."[14] Taft continued to prod for a definition but was unable to get one to satisfy him. He thought that the theory involved was one of unlimited government spending to maintain employment. He contended that the theory that government must spend enough money to make up the deficit in employment came primarily from Sir William Beveridge and he continued to insist that it did, even though Senator Wagner denied that he had even read Beveridge's recent book entitled *Full Employment in a Free Society*. He was not asked whether the book had been read and used by the men who had equipped him for the delivery of his speech.

The debate continued hour after hour as to the obligation of government to provide employment and the extent to which government ought to commit itself to a spending program for such a purpose. On September 26 Senator Radcliffe of Maryland sought to weaken the spending commitment of the bill by offering an amendment which he and Senator Taft had agreed upon in the minority report. It inserted a limiting clause that the govern-

13. *Ibid.*, Sept. 25, 1945, p. 8958.

14. *Ibid.*, p. 8958.

ment's spending program should be "consistent with its needs, obligations, and other essential considerations of national policy."[15] The amendment was presented by Radcliffe rather than by Taft, although the latter was much more astute and skilled in debate, because of the fact that Taft, a Republican, was a member of the minority party. Taft, however, came to Radcliffe's aid during the long debate which followed. At this point Senator O'Mahoney entered the fray. Says Professor Bailey:

> It is rare that a speech on the floor of the Senate actually changes stubborn Senate minds. O'Mahoney's presentation was an exception. It is generally conceded by friend and foe alike that the Wyoming senator's dramatic, illustrated lecture on the economics of S.380 had a marked effect on the final vote. With the use of charts and graphs placed in the well of the Senate floor and against the back wall of the chamber, O'Mahoney breathed economic respectability into the pending legislation. With the attitude of a patient professor he explained the technical economic concepts to his colleagues, emphasizing that he was opposed to deficit spending and that was why he was supporting the bill.[16]

On September 28 Senator Hatch of New Mexico offered a compromise amendment as a substitute for that offered by Senator Radcliffe. Although the new amendment precipitated further discussion of spending policies and of men who advocated them, including Sir William Beveridge, Lord Keynes, and Henry Wallace, it was eventually adopted. Various other amendments were proposed further defining and limiting the scope of the bill, and some of these were adopted. As it was amended, leading Republicans, including Senators Taft and Vandenberg, came to the support of the bill. It was passed by a vote of seventy-one to ten with fifteen senators not voting.[17]

From the Senate to the House of Representatives. The Full-Employment Bill had obviously done well in the Senate. It had escaped drastic limitation in the form of amendments and it had been passed by an overwhelming majority. There were a number of reasons for its success. Propaganda work on its behalf had been well done. Sponsors had been carefully selected. It had been sent to a friendly committee. Opposition to the measure had not yet become well organized and highly articulate. The end of the war was seen to be imminent, and speedy enactment of some such measure as this was widely believed essential to the prevention of economic chaos.

Diverse circumstances, however, were preparing a different fate for the bill in the House of Representatives. The conservative opposition was rapidly forming. It was being argued that no free society could guarantee full employment, that government spending to promote employment would undermine business confidence and business prosperity, and that the bill would lead to dangerous inflation. It was subject, in other words, to all the condemnation which conservative business interests had poured out upon

15. *Ibid.*, Sept. 26, 1945, p. 9026.
16. Bailey, *op. cit.*, p. 119.
17. *Congressional Record*, September 28, 1945, vol. 91, part 7, p. 9153.

the New Deal. The National Association of Manufacturers, the Chamber of Commerce of the United States, and other business organizations instituted a propaganda campaign against the bill comparable to that which the Senate committee staff had previously instituted in its behalf.

The bill ran into trouble almost at the door of the House of Representatives. The prime support thus far for the program incorporated in the bill had come from the Senate rather than from members of the House. Knowing of course that the bill must eventually be passed by the House if it was to become a law, the sponsors had arranged for its introduction in the House soon after it was introduced in the Senate. They had selected as its House sponsor Representative Wright Patman of Texas. Patman seems either to have lacked enthusiasm for the bill or to have lacked skill in handling it. He did not try to get it referred to a friendly committee, or if he tried he did not succeed. It might logically have been referred either to the Committee on Banking and Currency or to the Committee on Labor. Either by accident or design, however, Speaker Rayburn, or the House parliamentarian who handled such matters for him, routed the bill to the Committee on Expenditures in the Executive Departments, which was made up in large part of ultra-conservatives. When S.380 as passed by the Senate went to the House, it was naturally referred to the committee which had jurisdiction of H.R.2202, the Patman bill.[18] To win support for the bill Patman began collecting co-sponsors. He collected an eventual total of one hundred sixteen who did what they could in support of the bill, but they were never able fully to surmount the initial disadvantage of reference to the wrong committee.

House Committee Hearings. On September 25, 1945, the day on which the Senate began its debate on S.380, the House Committee on Expenditures in the Executive Department began hearings on H.R.2202, the Patman bill, and on another bill dealing with the same subject.[19] On its arrival in the House, S.380 was added to the group. The hearings extended over a period of approximately six weeks, and the printed record ran to eleven hundred sixty-three pages. The hearings were held nominally before the full membership of the twenty-one man committee, but enough members apparently absented themselves most of the time to give pretty much the effect of subcommittee operation. If the Senate subcommittee had been a bit caustic in its handling of critics of the bill, the House committee more than equalized the score by its sometimes harsh and derisive cross-examination of all who advocated programs of government spending to promote full employment.[20] The group of witnesses was in general less favorable to the bill than the group which had appeared before the Senate subcommittee. Most of the members of the House committee, having less interest in the bill than the leaders of the Senate committee, showed evidence of

18. See Bailey, *op. cit.*, pp. 150–53.
19. *Full Employment Act of 1945.* Hearings before the House Committee on Expenditures in the Executive Departments on HR.2202 79th Cong., 1st. sess.
20. See Bailey, *op. cit.*, pp. 156–59.

less preparation on the subject and less competence in dealing with the economic problems involved.

When the hearings were completed the committee was almost unanimously hostile to adoption of any kind of full employment bill. The committee agreed, however, to a motion made by one of the few friends of the bill that a subcommittee be appointed to draft a new bill which the committee could recommend. The subcommittee of five members drafted a new bill on which the committee issued a favorable report.

The House Committee Report. The House report, including a statement of minority views, ran to nineteen pages. It agreed that high levels of employment should be maintained but it scoffed at the idea that any such thing as full employment could be maintained, or that its maintenance was a function of government.

> The committee substitute unqualifiedly rejects this theory, under which employment through private enterprise would be perfunctory, and the guaranty would really rest on federal investment and expenditure — a gigantic and unworkable proposal contemplating improvised expenditures and unwholesome federal concentration. The adoption of such a theory not only would inevitably entail continued deficit spending, but would also destroy the system which has made this nation strong and great — the system of free competitive enterprise, under which the highest standard of living in history has been attained. The committee substitute recognizes that the way in which to achieve and maintain high levels of employment is to preserve and encourage the American system of free competitive enterprise, to aid in the development and maintenance of conditions favorable to stimulating new business, to encourage individual initiative and individual self-reliance, to avoid government competition with private business, and above all to adopt sound fiscal practices and maintain the credit of the United States. . . .
>
> It is time for a reaffirmance. It is time for a declaration that really means something. It is either private enterprise or statism. A declaration at this time is imperative if private enterprise is to function. The declaration must be sound. It must not be hampered with guaranties or assurances that would destroy.[21]

The House bill therefore abandoned the governmental commitment to maintain employment through government spending. It omitted any assertion of a man's right to a job. It asserted a national policy of preserving and encouraging the American system of free competitive enterprise and fostering investment of private capital, of stimulation of private business, of encouragement of individual enterprise, of avoiding government competition with private enterprise, and of adopting sound fiscal practices and maintaining the credit of the United States. It provided principally for an economic report to the President, which was to be made by a council of economic advisers and which would be submitted to Congress, whereafter a Joint Committee on the Economic Report would make such recommendations of congressional action as seemed advisable. The provision for estab-

21. House Report No. 1334, 79th Cong., 1st sess., pp. 6–7.

lishment of the Council of Economic Advisers was the contribution of the House subcommittee. The original bill was gutted of its statement of purpose and of most of its significant content. Four members of the House committee thought the provisions of the original bill too drastically weakened by the substitute. Another minority group of four members, however, was opposed to reporting any bill of any kind.

The Bill Before the Committee on Rules. Like most major House bills, the emasculated Full Employment Bill had to go to the Committee on Rules for placement on the House calendar and for prescription of the conditions under which the bill would be submitted for debate on the floor of the House. Most members of that committee, like most members of the expenditures committee, were ultra-conservatives and could be expected to have little interest in the measure. The bill was reported from the expenditures committee on December 5, 1945, and on the following day Representative Sabath, chairman of the Rules Committee, reported a resolution concerning the bill.[22] The resolution called for resolving the House of Representatives into the Committee of the Whole House on the State of the Union for the consideration of S.380. It provided that

> After general debate which shall be confined to the bill and continued not to exceed 1 day to be equally divided and controlled by the chairman and ranking minority member of the Committee on Expenditures in the Executive Departments, the bill shall be read for amendment under the 5-minute rule.[23]

At the conclusion of the debate, the committee should rise and report the bill to the House with such amendments as might have been adopted. Although there was nothing unusual about giving control of the debating time to the chairman of the committee and to the ranking minority member of the committee, it so happened that in this instance the procedure meant giving control to two men both of whom were hostile to any legislation in this field with teeth in it. There was little prospect, therefore, of amending the bill so as to restore some of the now-eliminated important provisions of the original measure.

House Debate on the Resolution. The initial discussion on the floor of the House of Representatives was not on the bill itself as reported by the Committee on Expenditures, but on the resolution of the Rules Committee to bring the bill up for consideration. To such resolutions one hour of debating time is allotted. The hour is equally divided between the chairman of the Rules Committee and the ranking member of the minority party on that committee, and is in part used by them and in part doled out to other members of their respective parties who desire to speak. Representative Sabath, a Democrat, announced that he would later yield thirty minutes to Representative Brown of Ohio, a Republican and the ranking

22. House Report No. 1342, 79th Cong., 1st sess., on House Resolution No. 449.
23. *Congressional Record*, December 6, 1945, vol. 91, part 9, pp. 11594–95.

minority member of the Committee on Rules, and proceeded to argue for consideration of the bill in the form proposed by the Committee on Expenditures in the Executive Departments. He referred to the widespread disagreement over the form of the bill and argued placatingly that "We cannot at all times have our own way and must yield to the judgment and conviction of other well-meaning and honest men." [24]

Representative Brown denounced and derided the bill. It was filled with pious platitudes, he declared, but actually did nothing as far as assuring full employment was concerned, except to provide a few choice political plums for some of the favored few. Its enactment would mean the creation of a new governmental agency by a Congress which had pledged the people to reduce materially the number of federal employees and the number of governmental agencies. It would be setting up machinery to do things which government already had the right to do. He doubted if the bill would have any effect toward achieving a high level of employment. When asked however, whether he would support a stronger bill, he declared that he would certainly not support any measure that obligated the United States government to guarantee full employment because it was something that the government could not do.

Representative Brown yielded five minutes of time to Representative Bender, who characterized the bill in its present form as an abortion. No one knew exactly what it meant. He held in his hands the book containing the hearings. "What a travesty. This book is almost the size of the Sears, Roebuck catalog, and I am sure it will not prove as useful." [25] He asserted that the only reason for enacting the now emasculated bill was to save face for the administration. Comment continued from all angles until expiration of the hour allotted for consideration of the resolution, whereupon it was adopted without a record vote, and the House was ready for consideration of S.380 itself.

House Debate on the Bill. Representative Manasco, chairman of the Committee on Expenditures in the Executive Departments, now moved that the House resolve itself into the Committee of the Whole House for consideration of the bill. Here, as in the normal course of consideration of most bills, the purpose of resort to the Committee of the Whole was to secure a less formal and more flexible procedure for discussion of the bill than is possible when the House sits as a body rather than as a committee. The resolution which permitted consideration of the bill allotted only one day for the debate, by contrast with the four days which had been taken in the Senate, and this in spite of the fact that the House membership was more than four times as large as that of the Senate. Such limitations of debate in the House are customary. They show recognition of the fact that, whereas in the smaller body a considerable amount of freedom of debate is still feasible, full debate by the larger membership of the House of Representatives is no longer possible in view of the tremendous amount of

24. *Ibid.*, December 13, 1945, p. 11966.

25. *Ibid.*, p. 11968.

business which Congress must transact. Limitation of the discussion of amendments to what is called the five-minute rule is also a product of the necessity for the conservation of time. That rule reads in part as follows:

> When general debate is closed by order of the House, any member shall be allowed five minutes to explain any amendment he may offer, after which the member who shall first obtain the floor shall be allowed to speak five minutes in opposition to it, and there shall be no further debate thereon. . . .[26]

The resolution, as noted above, placed control of the time of the debate in the hands of the chairman of the committee and of the ranking minority party member of the committee, dividing it equally between them. In pursuance of Manasco's motion, the House resolved itself into a Committee of the Whole for consideration of the bill. The speaker left the chair and was replaced by another member of the House as acting chairman of the Committee of the Whole. The clerk read the title of the bill, but the first reading of the bill itself was dispensed with by unanimous consent. It was true in this instance, as it is generally, that the several readings of bills in Congress have lost the importance they once had. Reference to them is now largely a matter of form.

Manasco, still having the floor, set aside for his own use fifteen minutes of the time which was under his own control. He did so by saying, "Mr. Chairman, I yield myself 15 minutes."[27] He proceeded with a discussion of the bill, but was interrupted at the end of fifteen minutes by the statement of the chairman, "The time of the gentleman from Alabama has expired." Thereupon he said, "Mr. Chairman, I yield myself 10 additional minutes," and proceeded with his discussion. He was interrupted from the floor from time to time by the formal plea, "Mr. Chairman, will the gentleman yield?" He gave the customary reply, "I yield." The give and take between himself and the other members again consumed his allotment of time, with the result that he yielded himself five additional minutes. The discussion continued, and he yielded himself ten more. At the end of that period he yielded fifteen minutes to another representative of his party and took his seat. In this fashion, he and the ranking Republican member of the committee controlled the disposition of time throughout the debate.

General debate was concluded at the end of the day on which it was begun, whereupon Representative Manasco asked that the bill be read for amendment. The clerk read it by title only.[28] At this point Representative LaFollette was recognized and he began to speak as follows, "Mr. Chairman, I move to strike out the last word."[29] Such a device is called a pro forma amendment. LaFollette proceeded to state that he had intended to introduce at this time one of the earlier bills as a substitute for that now before the House, but had inadvertently failed to get his substitute printed in the *Congressional Record* so that it might be read, and therefore would

26. *Rules of the House of Representatives* (1947), Rule XXIII, sec. 870.
27. *Congressional Record*, December 13, 1945, vol. 91, part 9, p. 11972.
28. *Ibid.*, p. 12027.
29. *Ibid.*, December 14, 1945, p. 12063.

not introduce it now. Representative Voorhis also had a comment to make. He got the privilege of making it by saying, "Mr. Chairman, I rise in opposition to the pro forma amendment."

Representative Dirksen then offered a substitute which provided for drastic changes in the proposal before the House. The proposed change was so sweeping that it was challenged as out of order because it was not germane to the matter under consideration. The chairman, however, ruled that it was clearly germane. Dirksen then asked for unanimous consent to proceed for an additional ten minutes in spite of the restrictions of the five minute rule. The request was granted. Dirksen's proposal called for the re-introduction of much of the content of the Senate bill. When his time had expired, Representative Hoffman, an ultra-conservative Republican from Michigan, won the floor saying, "Mr. Chairman, I rise in opposition to the amendment." Under the five minute rule no one else had a right to speak on the amendment. Representative Manasco avoided this restriction, however, by resort to the pro forma device, "Mr. Chairman, I move to strike out the last word." He urged that the amendment be voted down.

Representative Celler then won the floor and said, "Mr. Chairman, I move to strike out the last two words." Manasco asked him to yield for a unanimous consent request, and he did so, whereupon Manasco asked unanimous consent that all debate on this amendment close in fifteen minutes, the last five minutes to be reserved to "the gentleman from Mississippi," Representative Whittington, who had made for the Committee on Expenditures in the Executive Departments the report on the bill before the House. There being no objection, the request was granted. By these various devices, the five minute rule was relaxed to permit consideration of a proposal requiring more than five minutes of time for discussion, and a more acceptable terminal point was established. At the end of the fifteen minutes, Dirksen's amendment was rejected.

Proceedings of this kind continued. The original Patman bill was offered as a substitute, and its friends — that is, friends of the adoption of a genuine full employment bill — fought earnestly for its adoption. When finally the issue was brought to a vote, less than half the members of the House were present. On a division the vote was announced as Ayes, 81, Noes, 127. Representative Outland, who had offered the Patman bill as a substitute, apparently wishing to be sure of an accurate count demanded that the vote be retaken by tellers. A teller was then designated for each side. The two took their places in front of the House chamber, whereafter those representatives favoring the proposed substitute moved between them and were counted and were in turn followed by the opponents. By this time, some additional members had been brought into the chamber and totals were listed, Ayes, 95, Noes, 185. The amendment was therefore rejected.

Without a record vote the Committee of the Whole now agreed to the substitute which had been recommended by the Committee on Expenditures in the Executive Departments. The Committee of the Whole reported

the bill back to the House in this form. The House, with the speaker in the chair, agreed to the amendment. Representative Hoffman, who was opposed to enactment of even an emasculated bill, now tried to kill the measure by a motion to recommend it, that is, to send it back to the committee. While his motion was pending, another member sought to break in with still another amendment, but his strategy was blocked when Manasco moved the previous question on the motion to recommit and won by a vote of Ayes, 178, Noes, 70. Hoffman then demanded the Ayes and Noes on his motion to recommit, and a vote was taken showing the names of all voters and bringing a result of Ayes, 136, Noes, 242. By this vote the motion to recommit was rejected. A vote was then taken on the bill, bringing 255 Ayes and 126 Noes. By this vote the bill was passed. A motion to reconsider was laid on the table. As the final step, the title of the bill was amended. Since it was now in no sense a full employment bill it was characterized as

> An act to declare a continuing national policy and program to promote high levels of employment, production, and purchasing power in a free competitive economy.[30]

Work of the Conference Committee. Although the bills passed by the Senate and the House respectively bore the same number, S.380, they had little else in common. Before either one or any compromise between them could become a statute, therefore, it was necessary to resort to the formal machinery of compromise. The Senate could, of course, have accepted the House bill as a substitute for its own. Following normal procedure, however, it refused to accept the change made by the House, and adopted Senator Wagner's proposal that it disagree with the amendment of the House and asked a conference with the House. The presiding officer of the Senate appointed eight conferees from the Senate Committee on Banking and Currency under the leadership of Senator Wagner.[31] The speaker of the House of Representatives appointed five conferees from the Committee on Expenditures in the Executive Departments, headed by the chairman of that committee, Representative Manasco.[32]

As was customary, the proceedings of the conference committee took place in closed session. It is known that the conferees of each house fought hard to maintain the essentials of their own version of the bill. President Truman put pressure on the House conferees to accept the Senate version, but they refused to yield. The discussions of the conference committee carried over into 1946 and into the period of the second session of the Seventy-ninth Congress. The Senate conferees, equipped with proposals and phraseology by the Senate staff which had initially worked on the bill, continued to demand concessions on the part of the House. An agreement was finally reached and a conference report was ready for submission on February 6.[33] The conferees had succeeded in drafting a compromise

30. *Ibid.*, p. 12095.
31. *Ibid.*, December 15, 1945, p. 12104.
32. *Ibid.*, December 17, 1945, p. 12201.
33. See Bailey, *op. cit.*, pp. 222–27.

declaration of policy, which seemed to embody some of the Senate's concern about employment and some of the concern of the House about the preservation of free enterprise. That section of the bill now read as follows:

> The Congress hereby declares that it is the continuing policy and responsibility of the federal government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy, with the assistance and cooperation of industry, agriculture, labor, and state and local governments, to coordinate and utilize all its plans, functions, and resources for the purpose of creating and maintaining, in a manner calculated to foster and promote free competitive enterprise and the general welfare, conditions under which there will be afforded useful employment opportunities, including self employment, for those able, willing and seeking to work, and to promote maximum employment, production, and purchasing power.[34]

Beyond this point the bill agreed upon was largely the House bill. There was no assertion of a right to a job; there was no demand for full employment; there was no promise of wholesale government expenditures to maintain employment at any level; the bill retained the House provision for a Council of Economic Advisers to the President. The advisers were to be three in number and were to receive compensation at the rate of $15,000 per annum. The Senate's conferees brought about a change to the extent that Senate confirmation was made necessary to their appointment. The bill provided that the President should submit to Congress an annual economic report. It provided for a joint committee of the two houses of Congress on the economic report, which was to study the report, hold hearings on the subject matter, and make recommendations for legislative action.

The brief debate on the conference report which took place in the House of Representatives showed clearly that the House conferees regarded themselves as the victors in the struggle with the Senate. The report was taken as acceptable by the larger body of members, with dissent principally from those who held that no bill on the subject was needed. The House agreed to the report by a vote of 322 to 23. It concluded its consideration by voting that a motion to reconsider should be laid on the table.[35]

Two days later Senator Barkley, majority leader in the Senate, called up the conference report for consideration. He remarked that "The difference in philosophy between the Senate and the House bills was very marked, and it was not an easy task to resolve the differences between the two bills."[36] He emphasized the achievement involved in getting agreement on a declaration of policy. He asked adoption of the conference report. Some senators were disappointed with the meager results achieved. Others, who had been lukewarm towards the measure from the beginning, were perhaps better satisfied with it than with the original Senate version. After a brief debate the report was agreed to without a record vote.

34. *Congressional Record*, February 6, 1946, vol. 92, part 1, p. 975.
35. *Ibid.*, p. 986.
36. *Ibid.*, February 8, 1946, p. 1136.

Final Action. The bill was immediately signed by the presiding officers of the two houses and sent to the President of the United States. On February 21 the President reported that he had signed the bill.[37] In the meantime he had presumably followed the normal routine of sending the bill to the Department of Justice for recommendation as to his actions. S.380, bearing the title of Employment Act of 1946, now became Public Law 304. Copies were printed for distribution in pamphlet form and it was ready for insertion in the *United States Statutes at Large* and in the *United States Code* in its various forms of publication.[38]

Appraisal of the Course of Enactment. The experience of S.380 on its way through Congress was in many respects typical of that of other important bills. It grew out of a sense of public need without any initially clear public conception of the character of that need. It involved conflicting interests of powerful groups. It involved conflicting philosophies of the correct relation of government to economic life. It had ardent sponsors and bitter opponents. It had qualified support from many legislators who were convinced that something ought to be done but were somewhat in doubt as to just what that something was.

The measure was pending, furthermore, during a period of rapid change in its subject matter. When the bill was first introduced it was widely assumed that wholesale unemployment might well follow the termination of military hostilities. Before it had run the full legislative course, it began to seem likely that large-scale unemployment was not an immediate prospect. It was becoming apparent to some that a labor shortage and inflation provided a greater immediate danger than deflation and unemployment, and a flurry of post-war strikes proved irksome. Weariness with New Deal philosophy and with wartime controls provided resistance to the idealistic program of the bill as initially introduced, somewhat as war weariness at the close of World War I had led to a demand for return to normalcy. The Democratic administration, however, had committed itself to enactment of some kind of employment measure. Hence to save face an enactment was necessary. Many Democratic legislators, and the President himself, accepted the emasculated bill as better than nothing instead of rejecting it for its inadequacy. There is irony in the fact that, for the next two years at least, the unique provisions of the original bill proved not to be needed at all in the midst of high-level employment. On the other hand, the machinery provided by the bill, partly in the form of a three-man Council of Economic Advisers for the appraisal of the economic situation, proved of real value to the government in its attempt to smooth out some of the difficulties of reconversion to peace-time enterprise and in its efforts to cope somewhat with the problems of inflation. That machinery is still in operation.

In spite of the extent to which the vicissitudes of S.380 are typical of the experience of many bills, the fact must be emphasized that the legislative

37. *Ibid.*, February 21, 1946, vol. 92, part 2, p. 1510.
38. See 60 Stat. 23, *United States Code*, Title 15, secs. 1021–24.

process has a great deal of flexibility. The general sentiments of the times make a difference; the nature of the pressure groups makes a difference; the relative positions of the two parties make a difference; the personalities and parts played by individual legislators make a difference. Most bills undergo a certain amount of modification on their way through Congress, but the amount and character of that modification vary with circumstances. Large numbers of bills are sidetracked and die along the way. Of those that die, the great mass are never reported out of committee. Many of those which are reported are never picked up from the calendars for legislative action. Many of those passed by one house are never acted upon by the other. These facts demonstrate not so much defects in our bicameral system as the inevitable difficulty of securing enough harmony in the desires and interests of the people to permit enactment of genuinely democratic legislation. The purpose of Congress is not merely to enact as much legislation as possible but to express the will of the people if and when that will can be brought into focus in legislative acts.

Simpler legislative procedures than those described above are provided for largely non-controversial measures, which either have no great importance or no great amount of organized support behind them. In the House of Representatives, for example, a so-called consent calendar is provided. On the first and third Mondays of each month bills from this calendar may be called up and passed without debate if there is no objection to their consideration. If objection to consideration is offered, the bill is carried over until it is reached next time round the calendar. Objection at that time may result in its being stricken off the consent calendar altogether. By means of this device, however, considerable numbers of bills are passed which would never be allotted time for formal debate. A private calendar is provided also, and provision is made for periodic consideration of private bills which are placed on it. Again, by a period known as Calendar Wednesday, opportunity is given for occasional disposition of bills which call for no lengthy consideration but on which a limited amount of debate is desirable.

The number of proposals frustrated in spite of these devices is indicated by statistics accumulated at the end of the year 1947 for the 80th Congress 1st session, which met during that year. The number of bills introduced included 1,924 in the Senate and 4,831 in the House, a total of 6,755. Along with them were 454 joint resolutions, which in almost every respect except name are like bills. During that period, 973 bills were reported in the Senate and 1,100 in the House. Only 525 were enacted into law. While it is true that many of those pending at the end of the year were likely to be enacted during the second session of the 80th Congress, which met in January, 1948, the relations of these groups of figures indicate the traditional experience of the sum total of bills which are introduced.[39] The legislative process, therefore, is one of grinding pressure whereby some

39. For the figures on the 80th Cong., 1st sess., see *Congressional Record*, December 19, 1947, vol. 93, part 15, p. D495.

measures with tremendous drive behind them, and others which are the heirs of good fortune, find their way into enactment in some form, whereas the great mass of proposals are choked back and fail of enactment unless and until public sentiment and organized pressure of some kind can be brought to their support.

References

Stephen K. Bailey, *Congress Makes a Law: The Story Behind the Full Employment Act of 1946* (Columbia University Press, 1950).
Edward Berman, *Labor and the Sherman Act* (Harpers, 1930).
James M. Burns, *Congress on Trial* (Harpers, 1949).
Joseph P. Chamberlain, *Legislative Processes: National and State* (D. Appleton-Century, 1936).
Lawrence H. Chamberlain, *The President, Congress and Legislation* (Columbia University Press, 1946).
Armand B. Coigne, *Statute Making, a Treatise on the Means and Methods for the Enactment of Statute Law in the United States* (Commerce Clearing House, 1948).
Clarence C. Dill, *How Congress Makes Laws* (Ransdell, 1939).
Frank E. Horack, Jr., *Cases and Materials on Legislation* (Callaghan, 1940).
Chester L. Jones, *Statute Making in the United States* (Boston Book Co., 1912).
G. H. E. Smith and Floyd M. Riddick, *Congress in Action. How a Bill Becomes a Law* (National Capital Publishers, 1948).
Harvey Walker, *The Legislative Process* (Ronald Press, 1948).

12

The Legislative Setting

The Congress of today is what it is and operates as it does in no small part because of the kinds of people we elect to membership and because of the legislative machinery which preceding Congresses have adopted or evolved. Men "make a difference." Mechanisms make differences too. The purpose of this chapter is to add somewhat to the discussion of personnel which was introduced in the chapters on politics and nominations and to survey the formal machinery of the two houses, leaving to the following chapter most of the discussion of congressional party leadership in action.

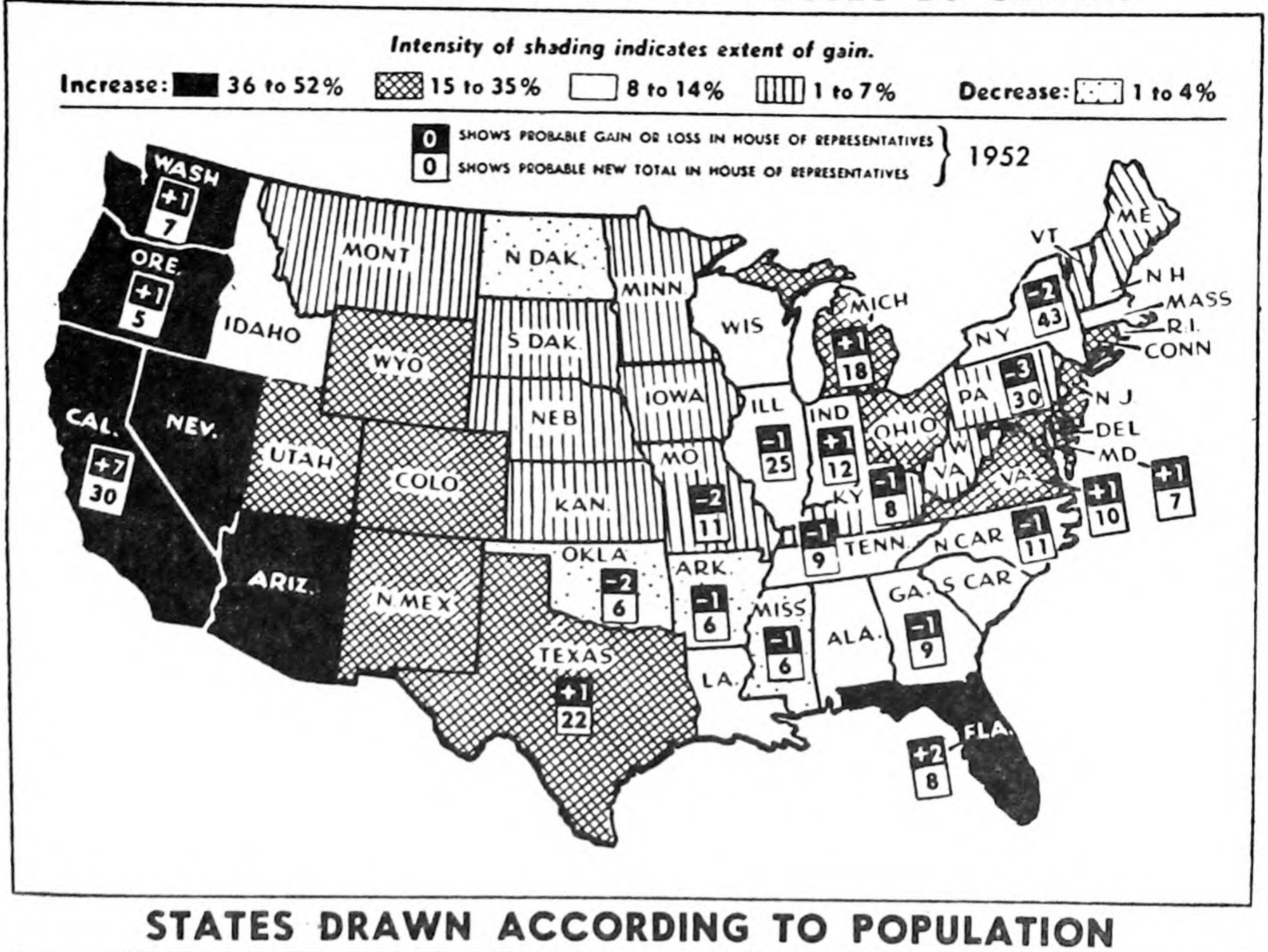
PERSONNEL IN CONGRESS

The Composite Picture. The 531 members of Congress — 435 in the House of Representatives and 96 in the Senate — reveal a great variety of characteristics. The vocational pattern of members of the Eighty-first Congress stood as follows when it assembled in January, 1949:

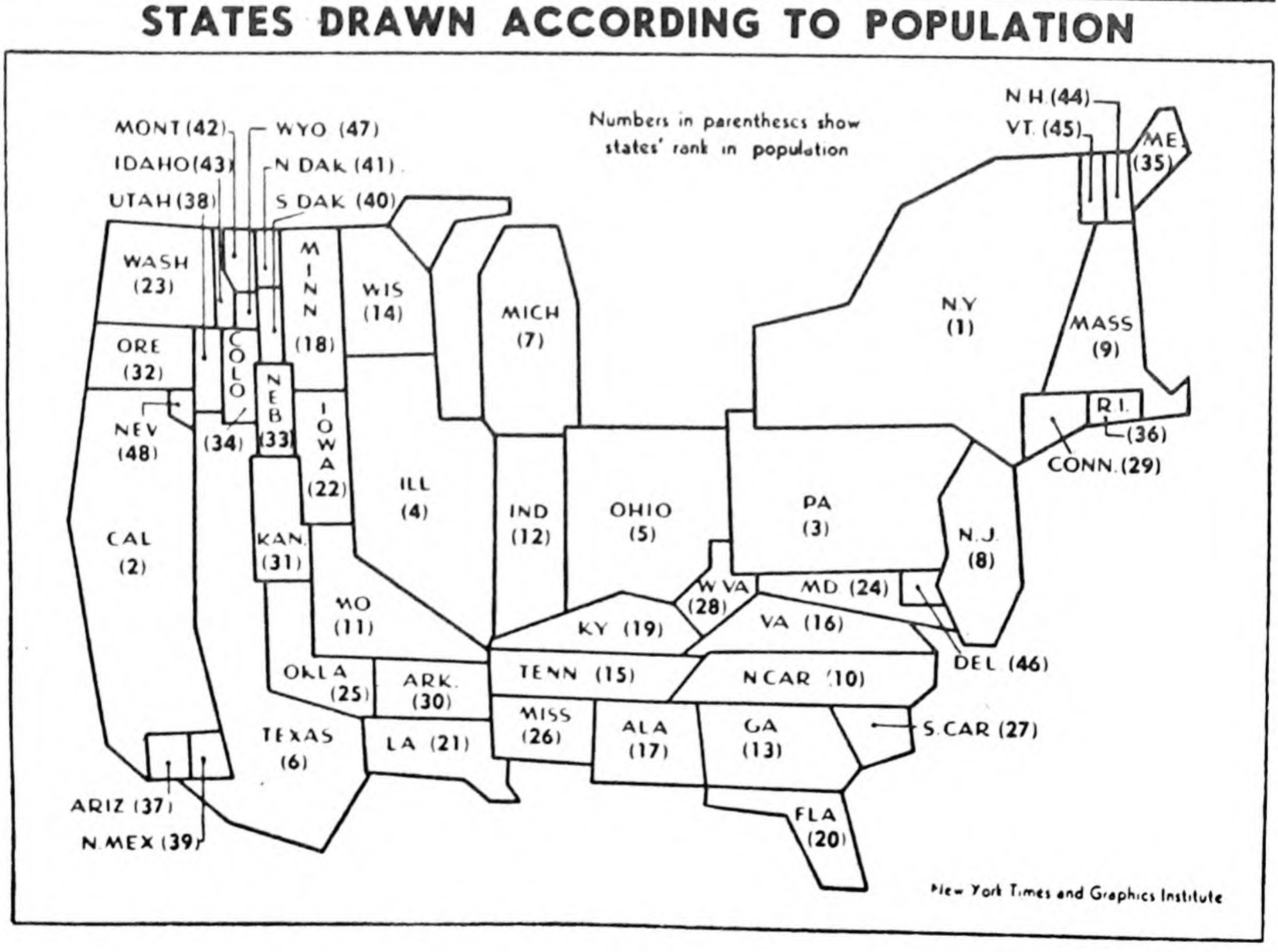
	Senate Percent	House Percent
Agriculture	6	6
Banking	2	3
Business or insurance	12	14
Medicine or dentistry	1	2
Politics or civil service	6	7
Journalism or publishing	4	7
Law	66	54
Teaching	3	7

The largest vocational category was 301 lawyers in the two houses. There were 27 ex-governors, of whom 26 were in the Senate. The Senate included 26 former House members, whereas the House included only 2 ex-senators. There were 9 women, 8 of whom were in the House. The one woman senator, Mrs. Margaret Chase Smith, had served in the House of Representatives during the five preceding Congresses. She was the first woman to be elected for a full six year term in the Senate. The average age of the total membership of Congress was 53.8 years.

1950 CENSUS—GAINS AND LOSSES BY STATES



STATES DRAWN ACCORDING TO POPULATION



How Recent Changes in Population Have Affected the Allocation of Members in the House

An observer of the Eightieth Congress, which served during 1947 and 1948, noted that average members were middle-aged, with the average for senators at 57 and for representatives at 52. He found members worrying about getting bald, with two senators allegedly wearing toupees. He found them gaining weight, with the average senator weighing 186, and the representative 184. Seventy-five percent of them had college degrees. The average senator had been married almost thirty years, and the average representative just under twenty-five years. No senator had been divorced, and only six representatives were known to have been divorced. The average member had a fraction over two children. Most members had religious affiliations. In the Senate there were 81 Protestants, 11 Catholics, and 4 members without religious affiliation. In the house were 307 Protestants, 55 Catholics, 5 adherents of the Jewish faith, 7 who had no affiliation, and 56 who made no commitments.[1] About 85 percent of the members were home owners, with the home of the average senator worth about $18,000, and of the average representative just under $11,000.[2]

In short, Congress is made up of an upper-middle class group of predominantly average Americans. They have financial, cultural, and professional interest in the existing social and economic order. They are in general conventional, except for occasional foibles which differentiate them from their fellows. Many of them smoke. A considerable number of them drink in convivial associations. Most of them dress conservatively. They are hard working people with hobbies for which they would like to save more time. They are politicians partly because they like people, and they are in Congress partly because people like them. In their thinking and in their legislative conduct they can be expected to reveal an almost instinctive understanding for and agreement with the desires and aspirations of average American people.

Individual Qualities. In spite of the general averageness of Congress, however, the differing qualities of individual men do break through here and there and affect the course of legislative events. The leadership of such important figures as Daniel Webster, Henry Clay, John C. Calhoun, John Quincy Adams, Charles Sumner, Jefferson Davis, William H. Seward, Albert J. Beveridge, George Norris, and other influential members, has its rightful place in American history. The decade around the turn of the half century bears the imprint of the legislative activities in the United States Senate of Alben W. Barkley, Harry F. Byrd, Paul H. Douglas, Estes Kefauver, Henry Cabot Lodge, Jr., Robert A. Taft, and Arthur H. Vandenberg. In the House of Representatives, where in larger numbers individual men are more nearly submerged, have appeared such influential men as

1. From the *Congressional Quarterly,* as quoted in the *Congressional Record,* January 27, 1949, vol. 95, part 12, pp. A381–82, included at request of Gordon L. McDonough.
2. See John M. Willig, "Portrait of the Average Congressman," *New York Times Magazine,* May 23, 1948, pp. 13, 34, 38. See also Madge M. McKinney, "The Personnel of the Seventy-seventh Congress," *American Political Science Review,* vol. XXXVI (February, 1942), pp. 67–75.

Emanuel Celler, Robert L. Doughton, Joseph W. Martin, Jr., and Sam Rayburn.

There is no classification of traits which distinguish particular individuals. Robert A. Taft is said to be an aloof individual without the capacity for making large numbers of warm friendships. It is said of him that he seems at times "to be at war with a very large part of the politically habitable American world, if not all of it." [3] Yet he has established a reputation for clear thinking and integrity. He has come to be regarded as one of the outstanding men in Congress at mid-century. Alben W. Barkley, until his election as Vice President of the United States took him off the Senate floor, was known neither as an intellectual leader nor as a rebel, but as a warm-hearted politician who had the capacity for resolving difficulties among his fellows and for promoting easy relationships between Congress and the President. Harry F. Byrd, on the other hand, has been an outstanding critic of the spending policies of the Roosevelt and the Truman administrations. His opposition has led President Truman to expostulate that there are "too many Byrds in Washington." Yet his consistently maintained position has won him wide respect. Arthur H. Vandenberg came to the fore in the middle of the war period as a leading policy maker in the conduct of foreign affairs. To him belongs much of the credit for the so-called bi-partisan foreign policy sponsored by Congress in the post-war years.

Individual success in Congress can be measured by a variety of standards. One such standard is the ability to get re-elected term after term. Another is to win support for legislative programs or for opposition to the programs of other men. Still another is the ability to use the congressional forum for broadcasting important ideas to the American people. Significant is the experience of Jerry Voorhis of California, who served in the House of Representatives from 1937 to 1947, when he was retired by defeat at the polls. He wrote thereafter a stimulating book entitled *Confessions of a Congressman*, in a review of which Turner Catledge characterized the author's career as follows:

> By standards of principles and conduct, Jerry Voorhis, Democrat of California, would be rated one of the truly outstanding members of Congress in the ten-year period he served, 1937 to 1947. He brought to Washington a deep religious conviction that the Christian gospel was to be taken seriously and that "poverty and suffering on the one hand and special privilege and inordinate power on the other are entirely contrary to its precepts." He also brought along a degree of sincerity, industry and devotion to duty not often found in one human package. He used to exhaust himself and his colleagues with constant barrages of five-minute speeches — on a list of subjects that ran the range from local issues in his district in California to the international money question.
>
> But Jerry Voorhis was far from a successful Congressman in the ordinary sense. No great law bears his name. He was ineffectual in terms of practical results. For one thing, he tried to encompass too much — mankind was his constituency. And, more importantly, he was ill-equipped to make

3. William S. White, "How to Win Influence, If not Friends," *New York Times Magazine*, May 1, 1949, p. 10.

the compromises which were necessary to convert his ideals into action. Nevertheless, he salvaged out of his legislative career something of more lasting importance to him than a law labeled with his name. It was an attitude, which he has set down in this volume. Some might call it an attitude of tolerance, but it was more than tolerance. It was an understanding of and devotion to the American system and the human factors that comprise it. For that reason alone we would recommend that *Confessions of a Congressman* be placed in the hands of Mr. Voorhis' fellow-idealists, especially those who have yet to butt their heads, as he did, against realities.[4]

The importance of re-election lies partly in the fact that it takes a great deal of time to learn the complicated machinery of Congress and to establish acquaintance with other members in order to become politically effective. It is in this connection that the political advantage lies with representatives from areas where one political party is much stronger than the other, and where the custom has been established of re-electing the same candidate term after term. This is not to say that an unbalanced party system and largely unobstructed re-election are necessarily good for the country, but rather that it is under those circumstances that able members of Congress have the best chances for political survival.

Individual Responsibilities. Although the account of the activities of members of Congress belongs primarily with the discussion of congressional machinery, it can be said here that each man or woman who becomes a member of Congress takes upon himself a tremendous burden. He has a constituency at home which feels free to call upon him for innumerable services. Because his political survival depends upon his re-election, he must, while absent from home, maintain his political contacts and keep himself from being out-maneuvered and shunted aside by politicians on the home scene. At the same time, if he is to justify his election to his constituents and is to render adequate service as a member of Congress, he must learn the machinery of the house to which he is elected, he must learn to find his way around among government agencies, and to utilize the services of special interests without being dominated by them. He must make some attempt at mastering a great variety of information with respect to pending legislation. Early in his first term in the Senate, Senator Paul H. Douglas outlined his responsibilities and his daily schedule in part as follows:

> One must live the life of a Senator to know its pains. It is relatively easy to offer advice. But it is a soul-trying experience after weighting evidence and conflicting claims and interests to be compelled to decide what is best for the people of the United States and then, as one must, to assume full responsibility for that decision. And the strain is intensified by the fact that one is forced to make many such fundamental decisions in the midst of a crushing burden of routine work.
>
> The Labor Committee, for example, has been holding two and three

4. Turner Catledge, "The Conscientious Mr. Voorhis," *New York Times Book Review,* December 21, 1947, p. 6.

hearings a day on the repeal of the Taft-Hartley law and this in itself has taken from five to eight hours of my time each day. Then there are hearings of the Banking and Currency Committee and the Joint Committee on the Economic Report on which I am also serving, and where I am trying to pull a laboring oar. But in addition to all this, I must also help to answer the mail which now averages over 700 communications a day, and which one morning reached 1,700, and meet callers and delegations. Let me chronicle a fairly representative day when the Senate was *not* in session:

7–8:30 A.M. Rise, breakfast, read two morning papers and study memoranda for hearings.
8:30–9:30 A.M. Look over mail, answer some of the most important letters and block out today's policy with the staff.
9:30–11 A.M. Hearings on the Taft-Hartley repeal.
11–12. Hearings on the housing bill.
12–1 P.M. Work on correspondence and see visitors.
1–2 P.M. Lunch with constituents.
2–2:30 P.M. See delegations and telephone Government departments.
2:30–5 P.M. Hearings on the Taft-Hartley repeal.
5–6:30 P.M. Sign 250 pieces of mail, send telegrams on pressing matters of business.
6:30–7:30 P.M. Dinner with group which wants to consult on legislation.
7:30–10 P.M. Hearings on the Taft-Hartley repeal.
10–12. Read two evening papers and several weekly journals. Clean up correspondence and study more material on Taft-Hartley law and housing problems, block out radio speech for next day.
12:30 A.M. Go to bed.[5]

If some members of Congress are less energetic, the burden of individual responsibility is nevertheless tremendous. We use our federal legislators for all that they have in them.

OVER–ALL PATTERN OF ORGANIZATION

The Two Houses. It is a commonplace but nevertheless important fact that Congress is divided into two houses. There are various reasons why the framers of the Constitution provided for two houses instead of one. Although the Congress which operated under the Articles of Confederation consisted of only one body, that Congress was not regarded as particularly successful or particularly worthy of emulation. The framers were more familiar with bicameral legislative assemblies than with those of but a single body. They knew best their state legislatures, which were bicameral, and they had a distant familiarity with the bicameral parliament of England. Furthermore, they sensed the value in having an "upper" house with special advisory powers and connection with the executive, a body somewhat more select in personnel than the more numerous "lower" house. So it is that the Senate gives the President advice and consent with respect to treaties and appointments, matters over which the House of Representatives has no jurisdiction.

Dividing Congress into two houses facilitated solution of a conflict over the

5. Paul H. Douglas, "Report from a Freshman Senator," *New York Times Magazine*, March 20, 1949, p. 10.

basis of representation. In the Congress which operated under the Articles of Confederation each state, whatever its population, has equal voting power. The large states opposed continuation of equal representation of the several states without reference to population. The small states, on the other hand, fought to retain their position of equality, arguing that their sovereignty would be endangered if representation were based on population. As a means of resolving this conflict, the Constitutional Convention provided for a Senate of two members from each state, whatever its size, and for a House of Representatives elected on a population basis, with the provision that each state, however small, should have at least one representative.

So it is that New York, which in 1940 had a population of approximately 13,500,000, has only the same number of senators as Nevada, which had a population of slightly more than 110,000. So it is also that New York elects 45 persons to the House of Representatives, whereas Nevada, like Delaware, Vermont, and Wyoming, elects only one. Thus from one point of view representation in the Senate is grossly distorted, whereas from the other point of view the distortion is in the House.

It was originally thought that the Senate, like upper houses in other legislatures, would have a somewhat more elite membership than the House of Representatives. Contributing to that end were both the indirect method of having United States senators elected by state legislatures and the longer term for senators, six years by contrast with two years in the House. Election of senators by state legislatures was abandoned for popular election through adoption of the Seventeenth Amendment in 1913, with results that are hard to appraise as far as the prestige of the Senate is concerned. The greater length of term probably has a continuing influence. The office is the more desirable because a senator, by contrast with a representative, does not have to begin plans for the next election almost as soon as his term begins. As is indicated above, many former members of the House secure election to the Senate, whereas only on rare occasions does a former senator enter the House of Representatives.

The Merits of Bicameralism. The bicameral arrangement is losing status in many parts of the world. In France, although the upper house, the Council of the Republic, is used somewhat for sifting and refining proposed measures for ultimate enactment, it is said that "the most distinctive characteristic of the French *Parlement* is its concentration of almost absolute power in the hands of one chamber, the National Assembly."[6] In England, the place of ancestry for most of our political institutions, the House of Lords has gradually lost much of its power. Since enactment of the Parliament Act of 1911, the House of Lords has not had the power to reject money bills; it has been able to delay other legislation for only two years, provided that within that time the bill is passed by the House of Commons three times in three successive sessions. Some members of

6. John C. Ranney and Gwendolyn M. Carter, *The Major Foreign Powers* (New York: Harcourt, Brace, 1949), p. 378.

the Labor government, which came into power after World War II, advocated the outright abolition of the House of Lords. In 1947, Harold Laski, a member of the Labor Party Executive, announced his belief in single-chamber government.

> I don't know of any genuine reason for a second chamber. At present the House of Lords is composed of 760-odd members, some of them very odd, and the average attendance is between 50 and 75.
>
> On the average, 98 members have made one speech a year, and since 1919, 365 peers have never made a speech at all. One hundred and ten peers have been insufficiently interested in the business of the House of Lords even to take the oath of allegiance so that they can take part in the proceedings.
>
> As Sir Walter Bagehot wrote, the only cure for the House of Lords is to go and look at it.[7]

In 1949 Parliament cut in half the period of delay which the House of Lords could enforce against bills passed by the House of Commons, but no serious attempt was made at abolition of the House of Lords. A liberal London magazine, *The Economist,* noted that "the services of the Upper House in the past four-and-a-half years both as a debating and a revising assembly, leave no doubt of its value and importance to the Constitution." It added further that "seriously, the Conservatives seem more interested than the Labour Party in reforming the Lords." [8]

The British Upper House therefore continues, but in a weakened condition, whereas "the Senate of the United States is now the most powerful second chamber in the world." [9] It may be that the survival of bicameralism in the United States is explained in part by the efficiency of a Senate of 96 members elected for six years by contrast with the House of Representatives of 435 members elected for two years. Whereas in other countries the drift away from bicameralism has been in the direction of the lodgement of power in the lower house, a movement in that direction in the United States would mean abandonment of the house in which we have the greatest confidence.

There are other considerations. Of the forty-eight states, only one, Nebraska, has abandoned bicameralism. In spite of a certain amount of continuous muttering about the inefficiency of requiring action by two legislative bodies instead of one, the American people have not found the device altogether bad. When the people en masse want legislation in a hurry, and when they either know what measures they want enacted or what leadership they want to follow, they can get speedy action from a legislative body. This is true, for example, in time of war or in periods of economic stress.[10] When the people are divided or are unsure as to what they want, the division usually reflects itself in the legislative body. Under

7. Baltimore *Evening Sun,* November 13, 1947.
8. *The Economist,* December 3, 1949, p. 1223.
9. Lindsay Rogers, " 'The Most Remarkable of all the Inventions of Modern Politics,' " *Parliamentary Affairs,* vol. III (Winter 1949), p. 104.
10. See for example E. Pendleton Herring, "First Session of the Seventy-third Congress, March 9, 1933 to June 16, 1933," *American Political Science Review,* vol. XXVII (February, 1934), pp. 65–83.

those circumstances the necessity of getting action by two houses instead of one does provide opportunity for obstruction and delay. However, obstruction and delay which give rise to further discussion are not necessarily bad. It is the task of American legislatures not merely to enact legislation, but to provide a forum for the discussion of proposed measures so that the people can decide what they want. When a measure passes one house but fails of enactment in the other, it almost always means that there are powerful dissenting groups, or at any rate groups which are doubtful as to whether or not they want the legislation. Upper houses in our state legislatures and in Congress, even when elected for longer terms and from constituencies differing from those of the lower houses, are nevertheless elective in some fashion and, unlike the British House of Lords and other upper chambers in other countries, have no hereditary rights. Like lower houses they must respond to the will of the people. For these various reasons the status of the upper house in Congress and in our state legislatures has not been widely challenged.

The Physical Setting. The two houses of Congress meet in chambers at opposite ends of the national Capitol building. Seating arrangements are semi-circular, after the fashion of most legislative halls in this country and elsewhere. Democrats sit at the right hand of the presiding officer as he faces the members, and Republicans at his left. Each member has a seat assigned for the session, and in the Senate the seats include desks. On the desks are placed bills, reports, and other documents which are relevant to current business. Galleries with substantial seating capacities look down upon the chambers. Certain sections are open to the general public, others to guests having cards from members, others to diplomats, and still others to families and friends of members and to government officials.

Since the houses provide seats respectively for ninety-six and four hundred thirty-five members, and since few debates are so important or so entertaining as to call for the constant attendance of any large percentage of the members, most debates are conducted with more seats empty than occupied, and with most of the visible audience in the galleries rather than on the floor. Speeches therefore often have an appearance of artificiality which they would not have if made to an attentive audience on the chamber floor. Members of Congress are sensitive to the criticism of constituents who visit the galleries and fail to find their representatives on the floor — witness a note on the descriptive sheet handed to Senate gallery visitors reading as follows: "Senators not present in the Senate Chamber may be found at committee meetings, in their offices conducting legislative business, or at the various executive departments on official business." To indicate something of the scope of work which he had done on the floor of the House of Representatives, a member of the Eighty-first Congress issued a "report to the people of the Second District of Wisconsin" showing his vote or his response to 236 roll calls during a single session. One hundred of them, however, had been merely quorum calls.[11]

11. *Congressional Record,* October 19, 1949, vol. 95, part 16, pp. A6603–04.

Although the chamber space is for the most part divided between the members of only two parties, instead of among many parties shading by small degrees from right to left as in European countries, the semi-circular arrangement does not promote the type of direct conflict between parties which is facilitated in the English House of Commons where the two parties directly face each other from straight benches on opposite sides of the chamber. Indeed, what are from one point of view serious defects of the American arrangement are incidentally suggested in the following excerpt from an address of Prime Minister Winston Churchill, made in 1943 when he advocated rebuilding the bomb-destroyed House of Commons according to its old pattern:

> There are two main characteristics of the House of Commons which will command the approval and the support of reflective and experienced Members. They will, I have no doubt, sound odd to foreign ears. The first is that its shape should be oblong and not semi-circular. Here is a very potent factor in our political life. The semi-circular assembly, which appeals to political theorists, enables every individual or every group to move around the centre, adopting various shades of pink according as the weather changes. I am a convinced supporter of the party system in preference to the group system. I have seen many earnest and ardent Parliaments destroyed by the group system. The party system is much favoured by the oblong form of Chamber. It is easy for an individual to move through those insensible gradations from Left to Right but the act of crossing the Floor is one which requires serious consideration. I am well informed on this matter, for I have accomplished that difficult process, not only once but twice. Logic is a poor guide compared with custom. Logic which has created in so many countries semi-circular assemblies which have buildings which give to every member, not only a seat to sit in but often a desk to write at, with a lid to bang, has proved fatal to Parliamentary Government as we know it here in its home and in the land of its birth.
>
> The second characteristic of a Chamber formed on the lines of the House of Commons is that it should not be big enough to contain all its Members at once without over-crowding and that there should be no question of every Member having a separate seat reserved for him. The reason for this has long been a puzzle to uninstructed outsiders and has frequently excited the curiosity and even the criticism of new Members. Yet it is not so difficult to understand if you look at it from a practical point of view. If the House is big enough to contain all its Members, nine-tenths of its Debates will be conducted in the depressing atmosphere of an almost empty or half empty Chamber. The essence of good House of Commons speaking is the conversational style, the facility for quick, informal interruptions and interchanges. Harangues from a rostrum would be a bad substitute for the conversational style in which so much of our business is done. But the conversational style requires a fairly small space, and there should be on great occasions a sense of crowd and urgency. There should be a sense that great matters are being decided, there and then, by the House.
>
> We attach immense importance to the survival of Parliamentary democracy. In this country this is one of our war aims. We wish to see our Parliament a strong, easy, flexible instrument of free Debate. For this purpose a small chamber and a sense of intimacy are indispensable.[12]

12. British *Parliamentary Debates*, 5th series, vol. 393, pp. 403–04. See also the continuing discussion on the pages which follow and on pages 1003ff of vol. 407 of the same series.

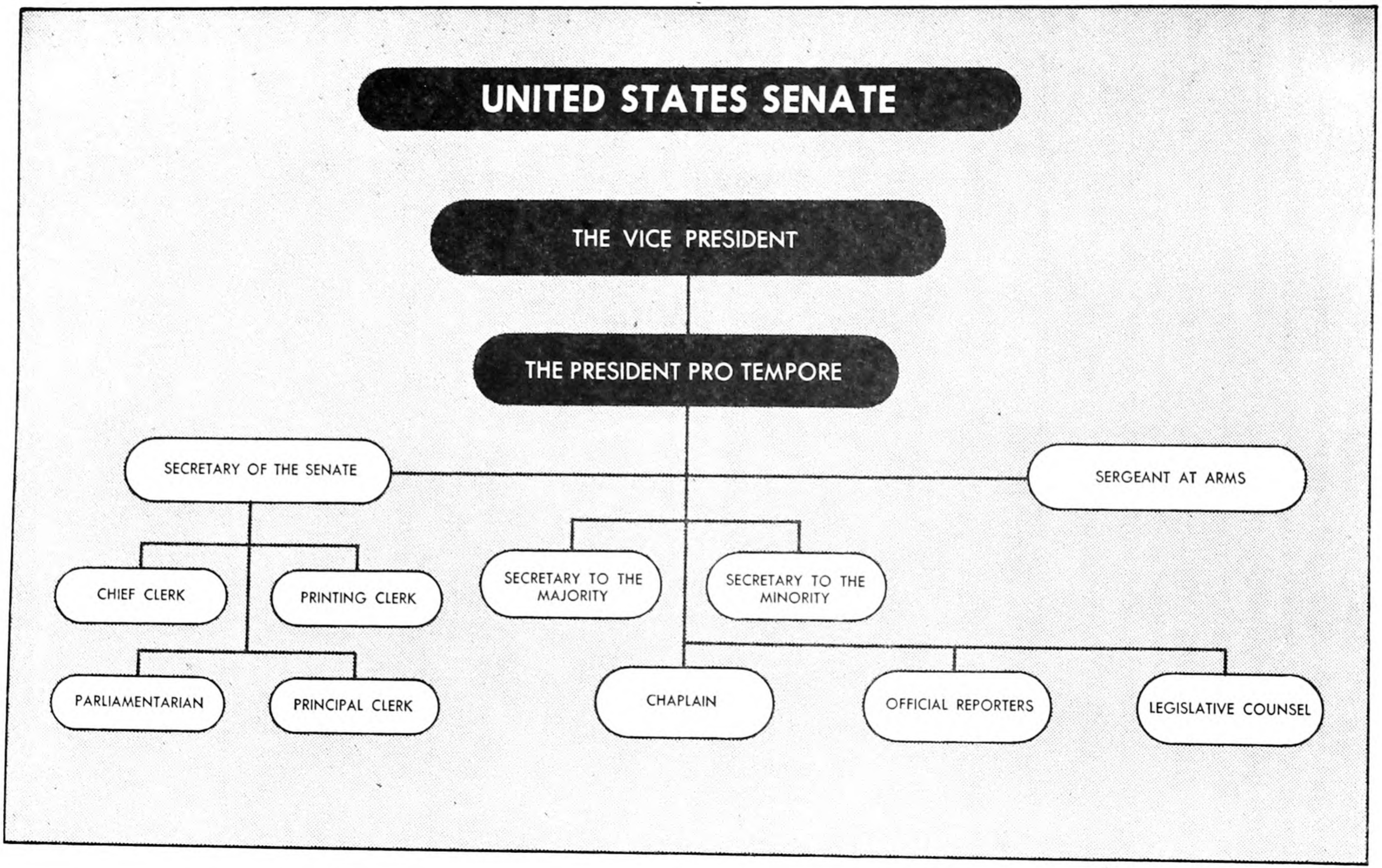
Whether or not for the reasons given by Churchill, there is relatively little direct, earnest, and effective public speaking in either of our congressional houses, speaking that would conform to high standards of oratory, or pleading, or invective. Standards of performance seem to be higher in the Senate, with its smaller chamber, its somewhat more select personnel, and its absence of limitation on length of debate, than in the House. Many well written speeches are delivered and there are occasional sparkling interchanges stimulated by the occasion. Much of the speaking on the floor is done, however, not for the education of fellow members but for use by the press and for the benefit of constituents and others throughout the country who will get the material second hand. An illustration is provided by a speech on income taxation delivered March 22, 1948, by Senator Morse, of Oregon. The Senator spoke in the early afternoon to an almost empty floor. His manner of speaking — as if he had a large audience — was highly artificial. He was a Republican, and the Republican senator who held the office of Majority Whip offered to have a quorum call, that is, a call of the roll which would have brought a number of the senators to the floor. Senator Morse declined the offer and began to speak as follows:

> Mr. President, I rise to discuss my views on the pending tax bill. I appreciate the suggestion of the Senator from Nebraska [Mr. Wherry], the acting majority leader, that he would be glad to extend me the courtesy of having a quorum call, but I ask him not to call for a quorum, because I am not speaking to the Senate today nearly so much as I propose to speak to the American people from the Senate Floor. Also I propose to speak to the RECORD for future reference. I do it because I am convinced that the tax proposal I made today will eventually become a part of the tax laws of this country and I want the RECORD to show that since I have been in the Senate I have been fighting for them.[13]

In spite of the implied contrast between debates in Congress and in the British Parliament, however, it should not be inferred that the differences are extreme. There are some good debates in Congress, and there are more of them in Parliament. There are many dull performances in Congress, but Parliament has them too, thickly interspersed among the more vital activities which take place on the floor. It is hard to tell the extent to which the matters to which Mr. Churchill called attention are responsible for such differences as exist.

Offices for Legislators. British and American practice also differs greatly in the provision of office space and various services for legislators. Each member of Congress has, either in the Capitol or in one of the adjacent office buildings, an office for himself and for secretarial and research assistance which Congress provides for him. These facilities are intended to promote his effectiveness as a legislator and to help him with the burden of work which he must do in Washington for constituents who call upon him for an infinite variety of services. By contrast, members of the House

13. *Congressional Record*, March 22, 1948, vol. 94, part 3, p. 3177.


UNITED STATES SENATE
THE VICE PRESIDENT
THE PRESIDENT PRO TEMPORE
SECRETARY OF THE SENATE
SERGEANT AT ARMS
CHIEF CLERK
PRINTING CLERK
SECRETARY TO THE MAJORITY
SECRETARY TO THE MINORITY
PARLIAMENTARIAN
PRINCIPAL CLERK
CHAPLAIN
OFFICIAL REPORTERS
LEGISLATIVE COUNSEL

of Commons who have no formal duties other than legislation are not provided with offices, or assistance, or even with postage or franking privilege for writing to constituents. They do not have desks in the chamber at which they can write, but merely sit on long benches. Some of them protest. For example:

> One must have some suitable place in which to receive visitors and refer to correspondence and papers. There must be somewhere where you can talk to them privately without interruption.[14]

Another, however, discussed possible changes with mixed feelings:

> I sometimes hope that while he will do everything he can to add to the comfort of the hon. Members he will increase the discomfort of constituents who visit us. We do not necessarily want to add to the number who come to see us on deputations and that kind of thing.[15]

An American legislator would wreck his political career if he made such a public statement. He operates much more fully as the servant of individual constituents than do members of the House of Commons. He may resent the burden but he dares not refuse to bear it. He seeks, therefore, to expand facilities for doing it so that he may better get it off his hands. Even so it may at times be true, as feared by his British counterpart, that the expansion of his facilities merely increases the demands which are made upon him.

INTERNAL MECHANISMS

The Senate. The Constitution provides that the Vice President of the United States shall be president of the Senate, without the privilege of voting except in case of a tie. A president pro tempore is chosen by the Senate to serve in the absence of the Vice President. Under no circumstances may the Vice President participate in debates. As a presiding officer he is expected to rule impartially, and not to operate openly as the instrument of his political party as does the speaker of the House of Representatives. An occasional ruling on a critical point may reflect party bias, and his even rarer votes, which are cast to break ties in the Senate, may have some importance. By and large, however, his influence over the Senate is insignificant unless he has personal qualities which would make him influential apart from the vice presidential office. Among the exceptions, it is said, was Vice President Jack Garner, who "knew how to wander around the Senate chamber during a zigzaggy debate while someone else presided, and sit down in the seat next to a wavering senator at exactly the right time to come up with the senator's vote on the subsequent roll call."[16] Vice President Barkley, with his background of many years in the Senate, has some of the same capacity for working informally to bring members to agreement.

14. Craig Henderson, *Parliamentary Debates*, 5th series, vol. 407, p. 1041.
15. Lord Douglass, *ibid.*, p. 1044.
16. Bascom N. Timmons, "John N. Garner's Story," *Collier's*, February 28, 1948, p. 49.

The president pro tempore, who presides over the Senate in the absence of the Vice President, is in effect chosen by the majority party with the choice governed largely by seniority. The slate of officers which is presented by the caucus of the majority party is always elected.

The Constitution declares that each House shall be judge of the qualifications of its members. Claimants are occasionally denied seats when election results are challenged, or when they are accused of misconduct. In January, 1947, for example, the Senate refused to seat Senator Theodore Bilbo of Mississippi, who was accused of intimidating Negroes and other offenses in running for reelection.[17]

The Constitution provides that "each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member." Between 1797 and 1801 Vice President Thomas Jefferson worked out a manual of procedure for the Senate. He based it on the Constitution and on practice in Parliament. Since that time *Jefferson's Manual on Parliamentary Practice* has provided the basis of procedure in both the Senate and the House of Representatives, with inevitable changes and additions as circumstances required.

The rules of each house are applied by the presiding officer, usually with the aid of a parliamentarian. Various other officers aid in the task of administration. They include clerks of the respective houses, reading clerks, bill clerks, tally clerks, sergeants-at-arms, messengers, pages, elevator operators, and so on. Some of these congressional aids become colorful and, in a minor way, influential fixtures. "Uncle John" Crockett who, retired in 1947 as Senate reading clerk after forty years of service, was such a one. Throughout that period he sat at a desk just below the presiding officer of the Senate. "In a booming voice that scared the pigeons off the skylights he read off the bills and amendments and called the roll." Thinking it a waste of time to read aloud every word of every bill as his predecessors had done, he slipped into the practice of reading the enacting clause and then skipping speedily to the end. "Whole pages fluttered to the desk unread and no senator raised an objection." He explained, "I figure I have saved the Senate many, many dollars in time." He became the recipient of the less lofty musings of Vice Presidents who held the presiding reins over the Senate. It was to him that Vice President Thomas R. Marshall voiced the sententious utterance that "What this country needs is a good five-cent cigar." [18]

The Chaplain. Officiating but for a moment at the beginning of each daily session is the chaplain of each house, a minister of a Protestant church in Washington who has been appointed to that office. The prayer, which on occasion has been as short as two sentences with a closing "Amen," and which seldom takes more than two or three minutes, may appear, and at

17. The action of the Senate was not made final and final action was rendered unnecessary by Senator Bilbo's death.
18. *New York Times,* November 23, 1947.

times may actually be, little more than an empty gesture before an almost empty house. Calling the roll in order to secure anything like full attendance at the delivery of the prayer is an unheard of event and would undoubtedly cause great indignation among the members.

Yet the custom of opening each session with prayer can be given meaning for the limited number of members who attend and for the reading audience. It was given meaning by the Reverend Peter Marshall, who was chaplain of the Senate from 1947 until his death in 1949. He found ways of phrasing prayers in terms of the basic problems of Congress. He could verbalize a sting which had some chance of penetrating the armor of preoccupation and arrogance and narrowly selfish interest. Here are some excerpts:

> Our Father in Heaven, save us from the conceit which refuses to believe that God knows more about government than we do, and deliver us from the stubbornness that will not seek God's help.[19]
>
> . . . . . .
>
> Give to the people of America, and to their leaders, the old-fashioned simplicity of faith, the old-fashioned honesty, and the old-fashioned love of country that sought to give rather than to get.[20]
>
> . . . . . .
>
> We need Thy help to do something about the world's true problems — the problem of lying, which is called propaganda; the problem of selfishness, which is called self-interest; the problem of greed, which is often called profit; the problem of license, disguising itself as liberty; the problem of lust, masquerading as love; the problem of materialism, the hook which is baited with security.[21]

An occasional example illustrates the problem of the moment, as when, in April 1948, the country was waiting anxiously for the results of an election in Italy which might bring a communist victory:

> We pray today for the people of Italy that they may be guided in the grave decisions they shortly must make.
>
> May Thy will be done in that ancient land.
>
> Save Thy people there from intimidation and coercion, and give them the courage of true faith in democracy that they may be free.
>
> May we in this free land esteem more highly our liberties, in the light of the price others are called upon to pay.[22]

Senate Rules on Debate. The rules of most parliamentary bodies throughout the world provide means for terminating debate on any question. The rules of the House of Representatives contain such limiting provisions, and they are regularly used. The United States Senate, on the other hand, has taken pride in the claim that it was a thoroughly democratic body, and that democratic discussion could continue as long as any member of the Senate wished to talk. It was not until 1917 that the rules were modified so that

19. *Congressional Record*, March 18, 1948, vol. 94, part 3, p. 3033.
20. *Ibid.*, February 11, 1948, vol. 94, part 1, p. 1258.
21. *Ibid.*, January 26, 1948, vol. 94, part 1, p. 495.
22. *Ibid.*, April 6, 1948, vol. 94, part 3, p. 4080.

debate, in theory at least, might be limited. At that time a group of sixteen senators, denounced by President Wilson as "a little group of willful men," engaged in what is called a filibuster by talking on extraneous matters toward the end of a session and preventing a Senate vote on a bill which would have given President Wilson power to arm merchant ships to enable them to protect themselves against German submarines. This particular filibuster stirred so much indignation that the Senate, in response to public opinion, modified its rules so that debate on any legislative measure could ultimately be terminated by a two-thirds vote. Nevertheless the Senate has been slow to apply this "closure rule." It still greatly prizes its reputation as a body which gives unrestricted consideration to every measure. When in the spring of 1948 it sought to apply the rule to clear the way for part of President Truman's civil rights program, a defect in the rule was discovered. It applied to debate on legislative measures, but not to debate on such procedural matters as the reading of the journal. In 1949 the defect was corrected, but in other respects the rule was weakened rather than strengthened.[23] In practice it is still possible to filibuster against any measure to which there is strong sectional or group opposition, such as bills to outlaw lynching, to outlaw the requirement of payment of a poll tax as a condition of voting, or to insure to Negroes equal rights with white people. On the other hand, measures which are genuinely popular throughout the country are in fact not likely to be seriously impeded by filibusters whether or not the closure rule is applied.

House Differences. Both houses of Congress make extensive use of standing committees, which will be discussed further along. Because of its greater size, the House of Representatives, theoretically the more democratic of the two bodies, has long found it necessary to limit debate on all measures brought before it. The limitation which is usually prescribed in a resolution brought forth by the Committee on Rules is often so drastic as to prevent anything like comprehensive discussion of the measure in question. Adequate consideration, therefore, if it takes place at all, must take place in the committee in which the bill is reported.

The House, like the Senate, chooses its own officers and employees. It elects the slate of officers proposed by the caucus of the majority party. Unlike the Senate, which must accept the Vice President of the United States as its presiding officer, the House elects its own Speaker. By tradition the speaker of the House of Representatives, by contrast with the speaker of the House of Commons, is expected to operate not as an unbiased parliamentarian, but as the instrument of his party. He is expected, in other words, so to interpret and apply the rules of the House as to give maximum aid to his party in all parliamentary matters. Because he is in effect as much a party officer as an officer of the House, further discussion of his office will be integrated with discussion of party control of Congress in the following chapter.

23. See Lindsay Rogers *op. cit.*, p. 112.

COMPENSATION AND ASSISTANCE TO MEMBERS

Salaries and Secretarial Aid. Members of Congress, like many other salaried employees, public and private, complain perennially that their salaries are too low. Although they have the legal power to increase their compensation at any time, they hesitate to do so because of the expectation of public criticism of their action in voting themselves funds out of the federal treasury. They have, indeed, voted themselves limited increases in spite of such criticism, but rising costs have consumed the added income. The costs have increased not merely through the course of inflation but also by virtue of the fact that the amount of time spent in Washington by each member of Congress has greatly increased. In earlier years an annual session of Congress might take up only a few weeks or at most a few months, constituting but an interlude spent away from home. Although the length of the annual sessions varies considerably, they are now likely to occupy considerably more than half of the members' time. Members from a distance find it necessary to maintain residences both in the states and districts from which they come and also in Washington, thereby adding to the financial strain. The Legislative Reorganization Act of 1946 raised all salaries to $12,500 a year plus a $2,500 non-taxable expense account. The Speaker of the House of Representatives and the Vice President now receive $30,000, and also a $10,000 non-taxable expense account. All members receive travel expenses in addition, based on actual mileage. Each representative gets $9,500 a year for clerical hire, and senators receive between $20,000 and $30,000 for the same purpose depending upon the size of their constituencies. Each senator is also provided with an administrative assistant who may receive a salary of not more than $10,000. Committee chairmen also have the benefit of additional research and clerical assistance which is provided for the several committees.

Retirement Pensions. For most members of Congress continuation in employment is highly uncertain. There is no way of giving federal legislators security of tenure without drastic modification of the democratic process. Because of the insecurity and unevenness of employment, Congress was slow in providing for its members retirement compensation such as that provided for military employees and throughout the civil service generally. By the Congressional Reorganization Act of 1946, Congress provided a pension system for retired members reaching the age of 62, who had served a minimum of six years and made prescribed contributions to a pension fund. In 1949 a newspaper commentator reported that 49 ex-legislators were drawing on the pension fund and cynically stressed the fact that the group included some who, as members of Congress, had fought against the extension of social benefits to others.[24] However valid the criticism as to particular individuals, it is clear that legislative salaries

24. Drew Pearson, "39 Ex-Legislators Draw U.S. Pay," *Washington Post,* March 15, 1949.

are not too high and that other rewards are no more extensive than they ought to be if high-grade membership is to be secured.

Other Perquisites. Members of Congress have the franking privilege, by means of which they make use of mail service without the payment of postage. The privilege reduces the cost of an enormous correspondence with constituents, whether in doing favors or conducting campaigns for re-election. Except for serious offenses, members are immune from arrest while in attendance and when going to and from the respective houses. They may not be questioned elsewhere for anything said on the floor — an immunity which is calculated to secure freedom from intimidation in dealing with public issues. This does not mean that they escape ultimate punishment if they engage in illegal activities. The elective process occasionally brings to Congress men whose integrity fails to measure up to their responsibilities. As of January 1, 1950, two former members of Congress were in federal prisons, one for his connection with war contract frauds and the other for misuse of his office payroll whereby he collected for himself money which he was authorized to pay for office assistance.

Aid in Drafting Bills. It is no easy matter to draft bills on complicated subjects in the form in which they ought to be enacted. The difficulty is not merely that of mastering difficult legal phraseology but also that of fitting new legislation into the body of existing law without doing more, or less, or something different from what is intended. The delicate and time-consuming character of the task has been in part responsible for the partial willingness of legislators to permit the executive departments to draft many bills on important subjects. Executive preparation of bills creates distrust and resentment, however, because of the feeling that the executive is usurping the jurisdiction of Congress and because of the fear that Congress may be persuaded to pass legislation which it would not enact in that particular form if it understood fully the import of some of its provisions.

To give aid to members of Congress and to congressional committees, an Office of Legislative Counsel is maintained in connection with each house. That office drafts bills on given subjects at the request of members and committees and goes over bills already drafted to see if they are correctly phrased for the purposes in mind. Some of the bills receiving closest scrutiny are those submitted by executive officers. This fact was emphasized by the Legislative Counsel of the House of Representatives in a discussion of the Securities Act of 1933, which has sometimes been characterized as rubber-stamp legislation — legislation drafted by the executive and approved on faith by Congress:

> That, according to the reports, was drafted by Frankfurter and Landis, and Ben Cohen and Tom Corcoran, and rubber-stamped by Congress. Allen Perley and myself can testify from knowledge, not from guesswork, but from absolute knowledge, that that is totally and absolutely untrue.

> In all our experience we hardly can think of an act that received more attention, from at least the House Committee, but as to the House committee, I do not know of any act on which the members of a committee did more work. I, and especially Perley, worked on that act with the House committee for 6 weeks, starting off with Cohen and Landis, starting out asking them foolish questions because we did not know anything more about it than a rabbit, and finally getting enough knowledge to ask intelligent questions, to find out what was intended to be accomplished, to analyze the thing.
>
> Then the Interstate Commerce Committee of the House, under the leadership of the present Speaker, Mr. Rayburn, had a subcommittee, I think it was five, and we met with that committee day after day, and they went over the thing, deciding the questions of policy, and told us to write it up, and then went over our draft and we worked for days and nights and weeks on it; the bill then went to the full committee and the full committee went over the draft.
>
> Of all the acts that is the common one that everybody says was rubber-stamped. I do not know of any act that received more careful attention from the legislative committee than that did. Some of the statements as to so-called rubber-stamping by Congress may be true, I don't know; but I know a lot are not.[25]

By the Legislative Reorganization Act of 1946 Congress provided for expansion of the work of the Office of the Legislative Counsel as an aid to individual legislators and to committees. The purpose was to improve the efficiency of the work of Congress generally and to promote independence from the executive in the drafting of legislation.

Research Assistance. The purely legislative responsibilities of members of Congress grow heavier year by year as government exercises increasing control over economic matters and as it expands operations in the international field. The legislator who does his job well must educate himself in a number of fields and have the backing of experts who know more facts on particular subjects than he can possibly have at his command. Here again Congress has access to the departments and other agencies of the executive branch. There is fear, however, that information from executive sources may be colored by the prejudices of the executive branch. Congress wishes to avoid such coloring. It can see no way of doing so except by building up individual staffs of experts, yet it is unwilling for obvious reasons to duplicate departmental staffs by large organizations exclusively under congressional jurisdiction.

The Library of Congress, which is really a national library located in Washington, has been available for the use of Congress for many decades. In it is the recently developed Legislative Reference Service, which accumulates information for members of Congress on various subjects. The arrangement has worked well enough so that in the Legislative Reorganization Act of 1946 Congress provided for great expansion of appropriations and personnel. The statute included the following important provision:

> The Librarian of Congress is further authorized to appoint in the Legis-

25. *Organization of Congress*, Hearings before the Joint Committee on Organization of Congress, 79th Cong., 1st sess., p. 422.

lative Reference Service senior specialists in the following broad fields: Agriculture; American government and public administration; American public law; conservation; education; engineering and public works; full employment; housing; industrial organization and corporation finance; international affairs; international trade and economic geography; labor; mineral economics; money and banking; price economics; social welfare; taxation and fiscal policy; transportation and communications; and veterans' affairs. Such specialists, together with such other members of the staff as may be necessary, shall be available for special work with the appropriation committees of Congress for any of the purposes set out. . . .[26]

These experts do not need to possess the political capacities of congressmen. They do not need to possess the generalized knowledge of many subjects which a politician and a member of Congress must possess. They need only to be experts in their particular fields and to have the capacity to impart to members of Congress so much of their expertness as is needed on particular occasions. If they have that capacity they can add greatly to the stature of individual legislators and of Congress as a body. The Legislative Reference Service operates under the supervision of an able and energetic director. If he succeeds in walking the political tightrope between the two major political parties and in avoiding offense to individual legislators, he is likely to build the agency to a position of great strength and influence. If the agency gets caught in the whirlpool of individual or party politics, Congress may have to devise other agencies or other methods of equipping itself with much-needed expert assistance.

Oddly enough, services which equip members of Congress with specialized knowledge needed for legislation, knowledge hitherto available much less to them than to members of the executive branch of government, may have the effects of bringing legislators closer to the executive but at the same time separating them from the people as makers of public policy. When a legislator knows no more about a subject than a constituent he may welcome the constituent's advice about governmental action. If he knows enough about the subject to render the constituent's advice inacceptable, he may feel torn between the sense of obligation to act according to his superior knowledge and his desire to retain the good will of people whose votes he will need in the next election.[27]

The question is in part one posed from time to time throughout our history — shall the people themselves do the governing through their representatives, or shall they, recognizing the superior equipment of their representatives to make informed decisions, permit the latter to govern as they think best? It involves a further question, however; namely, to what extent should representatives permit their judgment to be molded by experts with superior knowledge of intricate problems but without the capacity of skilled politicians for weighing public attitudes and public needs? Although the assistants provided to members of Congress through the Legis-

26. 60 Stat. 836.
27. See Ernest S. Griffith in *The Citizen's Participation in Public Affairs* (New York: New York University School of Law, 1948), pp. 33–34.

lative Reference Service and other agencies profess to give only information and not to seek in any way to influence policy, it is hard to mobilize facts without some reference to conclusions, and it is hard to keep the mobilization of facts from reflecting those conclusions. The expert doing research on social security is likely to organize his research and to make his reports somewhat in terms of his attitude toward the social security program. The expert on foreign affairs is likely to be influenced by the conclusions he has reached with respect to correct American policy. If the people permit members of Congress to legislate independently of popular desires and beliefs on the assumption that Congress has superior information, and if Congress derives its facts, and to some extent its conclusions, from specialized aid, then to this extent these aids, rather than Congressmen or the people, become the real governors of the country.

The problem of government by non-elective experts is not to be regarded lightly. True, the fact of government by non-elective personnel is not a new phenomenon. It exists already in the executive branch of the government on a scale far more vast than any likely to be achieved in the legislative branch. The fact of its existence in the executive, however, is no argument for its development in Congress. In some way it is necessary to preserve a hierarchy of control which includes members of Congress, the people who elect them, and the experts employed by Congress to aid them in the process of legislation. There is at the very least no point in shying away from the influence of congressional experts only to fall under the control of those who are entrenched in the executive branch of the government.

CONGRESSIONAL COMMITTEES

Legislative Committees. Much of the intensive work on legislation is done in committees. Even during the early years when its membership was relatively small, Congress discovered that the two houses were too unwieldy to work efficiently at the initial task of drafting and criticizing bills. Every important subject requires initially the concentrated attention of a few men. Each house is too large to give that kind of attention, and the number of important fields of legislation is too large to permit the same people to achieve even limited expertness in all of them. Congress has therefore found it necessary to divide itself into committees operating in specialized fields to do the preliminary work involved in getting bills ready for final consideration by the respective houses, or in sidetracking them so that time will not be taken by their consideration on the floor.

All bills introduced are referred to committees. Not all such documents are important, and many of them receive little or no attention even in the hands of the committee to which they are referred. The decision to consider them or not to do so usually rests with the committee itself. Enough of them do receive attention to require a great deal of hard work on the part of committee members. One committee or other has a great deal to say about the contents of every bill that is to be reported for consideration

on the floor, even if the final action of the committee is to accept a draft of a bill prepared in some executive department or written or rewritten in the Office of Legislative Counsel. Since as a rule proposed measures take shape in terms of the consideration given by the specialized committees, the respective committees deservedly get a great deal of credit for the framing of the legislation. Add to this the fact that research and secretarial assistance are allotted partly in terms of the work done by committees, and it becomes understandable that positions on influential committees and committee chairmanships in particular are in great demand.

Committees as Forums for Executive Officers. Although many bills are sponsored by the executive branch of the government or are of major importance to it, executive officers do not come before the assembled houses of Congress as they do in the British Parliament where the major executive officers are members of Parliament itself. There have been rare instances of executive appearances before houses of Congress, it is true, and in November, 1943, the Secretary of State, Cordell Hull, was received before a joint session of the two houses of Congress so that he might make a report on foreign affairs after his return from a European trip. Again, in May, 1950, Secretary Acheson addressed the membership of the two houses at a joint meeting which was held in the Library of Congress and answered questions from members of the group. In general, however, such officers are not permitted to appear before either house as such, and may not be required to appear — except under the unusual circumstances of an impeachment trial. Even the President makes only infrequent appearances, and then for the limited purpose of delivering formal addresses before joint sessions of the two houses.

It is primarily in congressional committees that executive officers have their formal working relationships with Congress. They testify on important legislation in their respective fields. Indeed, those who occupy a higher executive position have to testify so often and at such length that they protest against such extensive encroachment on their time, particularly when they have to repeat testimony because of overlapping committee jurisdictions. Committee members not only listen to formal statements but question witnesses in a degree of detail that would not be possible before the house as a whole.

Unfortunately the administrator is often able to defend himself against legislative probing and withhold the desired information. In the language of Professor Walton Hamilton, of the Yale Law School:

> Recently, I was present at a session in which a senator was questioning the head of a department. There was no question about his devotion to the public interest, but he did not know fully the affairs of the department about which he was inquiring. The result was that the administrative officer, who was in an impossible position, managed to protect himself very nicely against all those thrusts. So it seems to me that the key to the whole matter is a much more comprehensive and much more intimate knowledge than is now

possessed and it seems to me that the organization ought to move in that particular direction.[28]

It is before congressional committees, also, that lobbying groups and interested individuals of all sorts appear in person or by representation to explain their positions and attempt to influence legislation. Their formal presentations and their answers to questions yield much of the material from which the committee must work out its decision. It is often true of the skilled spokesmen of powerful interests, as it is of administrative officers of the government, that they possess knowledge and strategy which defeats at least in part the committee's desire to get at all the relevant facts.

Whether the witnesses be public or private, the difficulty of committee members in getting at well-concealed facts is explained in part by the fact that people who get elected to Congress are likely to be men and women with wide general knowledge and a wide range of personal contacts rather than people equipped with a store of specialized and technical knowledge which is needed as a basis for skillful questioning. As members of Congress, they must continue to demonstrate limited knowledge of many things, instead of taking time to become highly qualified in particular fields. In connection with service on committees, it is true, some of them do gradually become specialists, at least to the extent of knowing considerably more about the subject matter of their committees than do their colleagues who have their committee memberships elsewhere. So it is that some members of Congress come to be regarded as authorities on taxation, on foreign affairs, on agriculture, and on other subjects. It was in recognition of the need for specialized assistance, however, that Congress in the Legislative Reorganization Act of 1946 provided not only for the Legislative Reference Service and other aids already discussed but also for additional service directly to congressional committees.[29]

Committee Jurisdictions. Each House of Congress maintains committees to pass upon bills in the several important areas in which Congress enacts legislation. Some areas are more important than others, and with the passing of time some of them increase and others decrease in importance. It is therefore difficult to divide committee work equitably so that all committees have a comparable amount of work to do, and a comparable amount of prestige. In 1946 Congress reorganized its committee structure to provide for fifteen standing committees in the Senate and nineteen in the House of Representatives. The fifteen Senate committees were listed as follows:

Committee on Agriculture and Forestry
Committee on Appropriations
Committee on Armed Services
Committee on Banking and Currency

28. *Organization of Congress,* cited above, note 25, p. 708.
29. For a list of committee employees and their salaries from July 1 to December 1, 1949, see *Congressional Record,* January 17, 1950, vol. 96, part 1, pp. 459–61, and January 19, 1950, *ibid.,* pp. 664–69.

Committee on Civil Service
Committee on the District of Columbia
Committee on Expenditures in the Executive Departments
Committee on Finance
Committee on Foreign Relations
Committee on Interstate and Foreign Commerce
Committee on the Judiciary
Committee on Labor and Public Welfare
Committee on Public Lands
Committee on Public Works
Committee on Rules and Administration

The nineteen House committees were listed as follows:

Committee on Agriculture
Committee on Appropriations
Committee on Armed Services
Committee on Banking and Currency
Committee on Post Office and Civil Service
Committee on the District of Columbia
Committee on Education and Labor
Committee on Expenditures in the Executive Departments
Committee on Foreign Affairs
Committee on House Administration
Committee on Interstate and Foreign Commerce
Committee on the Judiciary
Committee on Merchant Marine and Fisheries
Committee on Public Lands
Committee on Public Works
Committee on Rules
Committee on Un-American Activities
Committee on Veterans' Affairs
Committee on Ways and Means

The Senate had previously had thirty-three standing committees, and the House of Representatives had had forty-eight. There had been a great deal of duplication and overlapping of jurisdictions. The reorganization was expected to centralize and systematize committee work, but its aims were achieved only in part. Even though many standing committees were abolished, so many subjects called for committee hearings and investigations that it was necessary to expand the number of subcommittees in order to get the work done. Responsibility in some instances has been shifted from recognized standing committees with well-identified chairmen to subcommittees which are able to operate somewhat behind the scenes because they do not have the status of standing committees. Reorganization has succeeded, however, to the extent of eliminating some overlapping, and it has eliminated a certain amount of inter-committee strife by virtue of

the fact that committee staffs, clerical assistance, and other perquisites are allotted not directly to the subcommittees but to the smaller number of standing committees.

Committee Memberships. Each legislative committee includes members of both major parties. The ratio of Republicans to Democrats on each committee is approximately the ratio of Republicans to Democrats in the membership of each house as a whole. The party having the largest membership in the house in question always has also the largest membership on the committee, and the chairman of the committee is a member of that party. All legislative committees in the Senate consist of thirteen members except the Appropriations Committee, which has 21 members. Membership on legislative committees of the House of Representatives varies considerably, ranging usually from twenty-five to thirty members. The majority party determines the exact ratio of Democrats and Republicans on each committee. Within each party the caucus or the conference of the party in each house determines the selection of party members for each committee.

Party selection of committee members become final only after a tremendous amount of juggling for position among the several members. Certain committees, such as the Committee on the Judiciary in each house, the Committee on Foreign Relations in the Senate, and the Committee on Foreign Affairs in the House of Representatives have high prestige and memberships are therefore at a premium. Members from predominantly agricultural areas are likely to seek popularity with their constituents by trying to get membership on the Committee on Agriculture. Legislators elected predominantly by labor groups are likely to seek membership where the labor interest can make itself felt most effectively. In general, the party allocates members to the several committees in terms of their interests, their abilities, and their prestige. Some members are inevitably disappointed in the juggling for position and instead of getting the desired allocation are appointed to the Committee on the District of Columbia or the Committee on Merchant Marine and Fisheries, or some other committee which is unlikely to add to their prestige or provide for the effective use of their talents.

Committee Chairmanships. Committee chairmanships are determined by seniority — a practice which Senator Hubert Humphrey has characterized as "the sacred cow in the legislative zoo." The chairman of each legislative committee is the member of the majority party who has the longest term of service and is in good standing with his party — except when the same person is the senior member of two or more committees, in which case he may choose the chairmanship of one of them. All chairmanships change when the party balance shifts from one party to the other. The allotment of chairmanships according to seniority has one great advantage, so great a one that in the dominant sentiment of Congress it outweighs all

disadvantages. It settles the problem of allocating these assignments peaceably and without controversy. Chairmanships involve high prestige and a great deal of power. If they became the spoils of political maneuvering in the process of attempting to select chairmen on the basis of merit, internal political warfare would be bitter and intense. Seniority provides an automatic solution. For this reason, although the practice is sharply criticized both in Congress and out, there is little prospect of its being abandoned.

One of the principal disadvantages of selecting committee chairmen on the basis of seniority lies in the fact that no considerations of merit enter into the selection except insofar as experience on the committee over a period of years may be an evidence of merit. In actual fact, the arrangement seems rarely to utilize the abilities of the men who are best equipped to act and who are at the forefront of national thinking on important issues. The method has another characteristic which is usually a defect. It tends to bring about the selection of chairmen from states which elect legislators from the same party term after term, and which tend to reelect the same individuals instead of making new selections. Relatively few chairmen represent those states or districts which shift back and forth between Democrats and Republicans and which in their own ranks tend to make changes in legislative personnel. Because of the sectional imbalance, Republican chairmen never come from a traditionally southern state. On the other hand, when the Democratic party is in power, far more of its committee chairmen come from the southern states than the population of the South would justify. In 1947–1948, when Congress was organized by Republicans, the states commonly regarded as southern provided no Senate committee chairmen. In 1949, when Democrats returned to power in Congress, committee chairmen were provided by Oklahoma, Tennessee, Maryland, Arkansas, Georgia, and Texas, and two were provided by South Carolina.

Committee Staffs. For a number of years the more important legislative committees have employed clerks, stenographers, and other aides. Filling these positions has usually constituted part of the political patronage of the committee chairmen. During the 1940's a movement was instituted for enlarging political staffs and for making the additional appointments without reference to political affiliations. Back of the movement was a growing awareness of the fact that many subjects of legislation were too complicated for adequate comprehension by committee members themselves. The Legislative Reorganization Act of 1946, in addition to enlarging the Legislative Reference Service, provided also for staffs of experts for the several legislative committees. Each standing committee was authorized to appoint a maximum of four professional staff members and six clerical members. The two appropriations committees, indeed, were placed under no restriction but were authorized to appoint such staff as each deemed necessary. The professional staff members were to be appointed "on a permanent basis

without regard to political affiliations and solely on the basis of fitness to perform the duties of the office." [30] An investigation made in 1948 showed that in terms of the purposes of the Reorganization Act, eight Senate committees and five House committees appeared to be well-staffed with competent persons.[31] Other committees had made less adequate improvement or none at all. One obstreperous committee chairman, indeed, refused to answer any questions. He declared that the qualifications of his staff were the business of no one but himself and his fellow committee members, and directed the investigator to "go to Walter Winchell or Drew Pearson for information." [32]

The activities of professional staffs vary from committee to committee, depending upon the range of their abilities and upon the willingness and capacity of legislators to make use of them. Some legislators seem unable to make effective use of expert assistance. Others rely heavily upon experts from the executive departments, and upon information and assistance provided by various interest groups. It seems probable, however, that the use of committee experts will expand as committee members become accustomed to it. Staff members perform varied parts with respect to committee hearings. They may assume much of the responsibility for seeing that people who ought to testify at particular hearings are called to do so. They put the hearings in shape for publications. They may even be entrusted with the task of preparing the reports to Congress, in terms of which committees recommend that bills be enacted. In doing so they are expected to act on the basis of committee intention. In this they may or may not succeed. They have been known to misinterpret the attitude of a committee sufficiently to require that a report published in the name of a committee be recalled after discussion on the floor or in the press for rewriting to express committee intent.[33] Occasional mismanagement, however, does not necessarily invalidate the proposition that a maximum of routine matters ought to be delegated to committee staffs. The trend is in the right direction.

Joint Committees. Most matters which require legislation, and many which require merely investigation or supervision, come within the jurisdiction of separate committees for each house. Witnesses often complain of the necessity for duplicate appearances before two or more committees. Some duplication may occasionally be averted by the organization of joint committees of the two houses. One example was the Joint Committee on the Organization of Congress, which did the background work in prepara-

30. 60 Stat. 834.

31. Gladys M. Kammerer, *The Staffing of the Committees of Congress* (Bureau of Research, University of Kentucky, 1949), p. 27.

32. *Ibid.*, p. 12.

33. An example is Senate Report No. 1026, 80th Cong., 2d sess., on S. 2393, a bill to authorize the giving of aid to China. For Senator Vandenberg on the withdrawal and modification of the Report, which he regarded as unduly critical of Generalissimo Chiang Kai-Shek, see the *Washington Post*, March 27, 1948, and the *New York Times*, March 28, 1948.

tion for the Legislative Reorganization Act of 1946. The Congressional Directory for January, 1950, listed the following joint committees:

Joint Committee on Printing
Joint Committee on the Library
Joint Committee on Internal Revenue Taxation
Joint Committee on Reduction of Nonessential Federal Expenditures
Joint Committee on the Economic Report
Joint Committee on Atomic Energy
Joint Committee on Foreign Economic Cooperation
Joint Committee on Disposition of Executive Papers

As far as legislation is concerned, however, each house usually prefers to consider bills independently. Indeed, if we assume that there is justification for the maintenance of two legislative houses, it may be a reasonable assumption that the country should have the benefit of full and independent consideration of each measure by each house in committees as well as on the floor.

COMMITTEES WITH SPECIALIZED FUNCTIONS

Special Committees. Although the committees listed herein, whether of each house or of the two houses jointly, have been standing committees whatever their individual function, the discussion thus far has been almost exclusively in terms of legislative committees, to which bills are referred and which report bills for the action of the respective houses. Certain of the standing committees have specialized functions, however, which require discussion along with the specialized functions of still other committees not previously mentioned. Among these committees with specialized functions are investigating committees such as the Committee on Un-American Activities of the House of Representatives, other investigating committees which may be established from time to time, conference committees, and "watchdog" committees which are appointed to keep Congress informed about the administration of particular statutes. Because of its connection with control of Congress by political parties, discussion of the Committee on Rules of the House of Representatives will be left to the following chapter, along with discussion of policy committees, steering committees, and other agencies which are primarily party instruments.

Although Congress operates primarily through standing committees with chairmen selected according to seniority, it yields from time to time to pressure for creation of special committees for various purposes, and particularly for making designated investigations. The subject may be one which, because of the membership of the relevant standing committee or the personality or interest of its chairman, is not likely to be properly investigated by a standing committee. If vigorous action is required, a special committee may have a great advantage in that its chairman and its other personnel will

be chosen for the specific purpose of the investigation, largely without reference to seniority. The drive for establishment of a special committee may come primarily from some aggressive legislator who wants a particular subject investigated, or who wants for himself the prestige or notoriety which comes from heading a vigorous investigating committee. During the 1920's Senator Thomas J. Walsh of Montana built for himself a national reputation as a relentless investigator of the misconduct of businessmen and corporations. Harry Truman paved his way toward the vice presidency — and the presidency itself — through his investigation of the conduct of World War II, at the same time performing very valuable services for the country. In the late 1930's and early 1940's Martin Dies made himself nationally notorious for his handling of the then special committee of the House of Representatives known as the Committee on Un-American Activities, through his dogmatic display of anti-liberal bias and his ruthless disregard of the rights of witnesses. Two of his successors, John E. Rankin and J. Parnell Thomas, used similar tactics and displayed similar bias apparently in attempts to build the same kind of reputations.

Defects of Special Committees. For the reasons indicated, the difference between the results achieved by a special committee and by a standing committee may be the difference between a vigorous and illuminating investigation and a perfunctory investigation which results in a whitewash of the persons and activities which ought to be exposed. Nevertheless there are solid grounds for opposition to the frequent use of special committees. Their appointment increases duplication in committee work. It sets up additional agencies to examine into subjects which are presumably covered by the pattern of standing committees. If the special committee recommends enactment of legislation, the recommendation must usually pass through the hands of a standing committee before a bill can be reported to the house in question, with resulting duplication of hearings and other procedures. Another objection is based on the type of legislative personnel often assigned to special committees. When the subject involves investigation of personal conduct, it tends to attract not the outstanding personnel of the respective houses, but legislators such as Martin Dies, John E. Rankin, and J. Parnell Thomas, mentioned above, who display a penchant for snooping into other people's activities and show streaks of sadism which are employed on witnesses whose points of view they find unpopular. Such men often grill witnesses with gross disregard of their rights of privacy or their right to treatment as self-respecting human beings. Questioning is sometimes conducted in private without granting the witness the privilege of the companionship of either counsel or friends. Initial private questioning may be conducted by a single member of the full committee, accompanied by a committee counsel whose function it is to dig out information of a particular kind by whatever means possible. At subsequent public hearings the witness may be required to restate things said in the private hearings which the members or the counsel desires to get into the public

record, and may be denied the right to reproduce that portion of his earlier statement which portrays the damaging testimony in its rightful setting. The investigation may be used to create unfavorable publicity for people whom the committee dislikes or whose views it dislikes. It may damage their positions in their communities and interfere with their opportunities for earning a livelihood. The right to present opposing or extenuating evidence may be denied, or if the right is not denied altogether the committee may proceed week after week and month after month to collect and publish evidence taken only on one side, with the result that the desired public impression is irrevocably fixed before the opposing evidence is allowed to be introduced.

These abuses, it is true, could and perhaps occasionally do occur in connection with investigations carried on by standing committees as well as those carried on by special committees. By and large, however, it is in special investigating committees that the more serious abuses of the rights of individuals take place. To restrict these abuses, to avoid duplication, and for other reasons, Congress committed itself in the Legislative Reorganization Act of 1946 to the principle of abandoning special committees in favor of using standing committees for virtually all purposes. Unfortunately, perhaps, the House Committee on Un-American Activities was at that time so deeply entrenched politically as to bring about its classification and continuation as a standing committee.

In spite of its commitment to abandonment of use of special committees, Congress finds it difficult to resist pressure for the establishment of additional subcommittees. Senate Republicans, who achieved majority control in 1947, continued two special committees evidently for the principal purpose of providing committee chairmanship for two ambitious senators. In 1949 the House of Representatives established a Select Committee on Lobbying Activities. Others are likely to be established from time to time in spite of opposition on the basis of principle.

Conference Committees. Most of the legislative and investigative activities of the committees so far discussed precede the discussion of bills on the floor of the respective houses. Conference committees, by contrast, have jurisdiction over bills which have been passed by both houses but in different forms, and which require harmonizing if they are to become statutes. Conference committees consist of members of both houses who are appointed by the respective presiding officers. They usually include the principal sponsors of the bill in each house. The committee representatives of each house attempt to secure, as far as possible, the provisions preferred by their own house, but they proceed with the knowledge that concessions usually have to be made on each side. As in the instance of the Employment Act of 1946, discussed in an earlier chapter,[34] the President of the United States sometimes intervenes in the work of the conference committee in attempt to secure a compromise satisfactory to himself. His

34. See Chapter 11.

success in the matter is likely to depend upon the scope of his political influence over Congress generally at that time.

Conference committees have sometimes extended their activities beyond compromising differences in bills and have included new material or eliminated items included in a bill as passed by both houses.[35] Congress included in the Legislative Reorganization Act of 1946 a provision to limit the freedom of the conference committee in such matters, but not entirely to destroy it. Speeches on the floor of Congress may still be heard in which members advocate taking matters to the conference committee so that particular controversial issues may be thrashed out there.[36] Here, as elsewhere, a measure of play in the machinery of government is required if the machinery is to operate effectively, but too much play takes the agency outside its proper jurisdiction.

If conference committees fail to reach agreement, the bill in question does not become law. If a committee does reach agreement, the compromise at which it arrives must be accepted by each house before the bill can proceed on its way to the President for his signature. If one of the houses rejects the compromise, the bill is likely to be sent back to the conference committee for further consideration. Most bills which reach the conference committee stage are eventually harmonized into agreement, but they occasionally die at this stage because no agreement can be reached.

"Watch-dog" Committees. When Congress enacts measures dealing with rapidly changing situations, and when such measures confer broad powers on administrative officers, it often seeks ways of checking on the administration of these measures. One of the techniques used is the establishment of "watch-dog" committees. One such committee was provided for by the Taft-Hartley Act of 1947, which made drastic changes in the National Labor Relations Act. The committee, known as the Joint Committee on Labor-Management Relations, was authorized to make a thorough study and investigation of the entire field of labor-management relations. It developed primarily into an instrument of party politics. The majority of the committee limited itself almost exclusively to a defense of the Taft-Hartley Act and its administration.[37] The Democratic minority, postponing its dissent until the Democrats returned to power in 1949, concerned itself primarily with denunciation of the Taft-Hartley Act.[38] The minority report indicated that the joint committee had gone beyond the study of labor relations and the administration of the Taft-Hartley Act to direct interference in matters of administration. The committee, in other words, sought to extend committee jurisdiction completely beyond the range of rule-making into the area of administrative operations.[39] On the whole this particular "watch-dog" experiment seems to have worked badly.

35. See *Reorganization of Congress, op. cit.*, pp. 104–105.
36. See for example the speech of Senator Morse, of Oregon, *Congressional Record*, March 22, 1948, vol. 94, part 3, pp. 3196, 3197 and 3199.
37. See Senate Report No. 986, part 3, 80th Cong., 3d. sess.
38. See Senate Report No. 394, 81st Cong., 1st sess.
39. *Ibid.*, pp. 59–60.

Another such committee, the Joint Committee on Foreign Economic Cooperation, seems to have worked better. The function of this committee was to study and report the experience of the Economic Cooperation Administration in administering aid to Europe under the so-called Marshall Plan. Members and staff of this committee toured Europe working harmoniously with, but at the same time independently of, the Economic Cooperation Administration, studying the reactions of European countries to administration and reporting their findings to Congress. They watched particularly the reaction of communists to the Marshall Plan, and the conduct of beneficiary governments in living up to their commitments to the United States. Their independently published findings have had value not only for Congress but for administrative agencies as well.[40] Although in exceptional instances the conduct of visiting members of Congress may have embarrassed the administration, the work of the committee did not generally extend beyond the legitimate scope of congressional investigation.

THE LEGAL STATUS OF COMMITTEE ACTION

The Scope of Powers. It is a well recognized fact that the work of congressional committees is essential to the successful operation of Congress. Congress must have facts which cannot be searched for by an entire house as a unit. Preliminary steps in the planning of legislation require far more in the way of careful consideration than an entire house could possibly give to particular measures. Because the work is necessary, congressional committees, whether standing committees or special committees to which particular tasks are assigned, must have adequate powers. Congress is generous in the allocation of powers to committees. They are authorized to subpoena witnesses and records and to compel witnesses to testify about matters under investigation. Under an act of Congress passed nearly a century ago, Congress provided that any person summoned as a witness who refused to appear or to answer any questions pertinent to the question under inquiry should be guilty of a misdemeanor, which should be punishable by a fine of from one hundred to one thousand dollars and imprisonment for from one to twelve months.[41] Recalcitrant persons are punished from time to time under this statute. The Supreme Court has held that Congress has the power to compel testimony:

> We are of opinion that the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function. . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information — which not infrequently is true — recourse must be had to others who do possess it.[42]

40. See for example *Knowledge of the Marshall Plan in Europe: France,* Senate Report No. 1203, 81st Cong., 1st sess.
41. Act of January 24, 1847, 11 Stat. 155, *United States Code,* Title 2, sec. 192.
42. *McGrain* v. *Daugherty,* 273 U.S. 135, 174–75 (1927).

The fact that a committee may abuse its power does not of itself invalidate the exercise of the power. True, the power may be exercised only in pursuit of a legitimate end. A witness "rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry."[43] Unfortunately for him, if he refuses to testify on that ground he does so at his own risk. The courts may disagree with him as to the legitimacy of the inquiry and he may find himself subject to fine and imprisonment.[44]

Recent controversies over exercise of the investigative power have arisen largely in connection with the work of the Committee on Un-American Activities, which has sought to expose communists wherever they may be found and has at the same time attempted to classify as communist and to discredit liberal activities of various sorts which are not communist in any true sense but were opposed by members of the committee. The matter is one of growing importance as the United States and the Soviet Union become more and more directly aligned against each other. The welfare of the United States may require that the government keep thoroughly informed about the membership and activities of communist groups throughout the country. If it is to keep so informed it must have broad powers of investigation, but the exercise of these powers needs to be carefully restrained.

Proposed Regulations. Others have felt that Congress itself must deal with abuses of power by its own committees. Although bills have been introduced on the subject, no formal action has been taken by either house. Evidently in response to widespread discussion of the problem, a subcommittee of the House Committee on Expenditures in the Executive Departments, under the chairmanship of George H. Bender, paved the way for other committees by adopting a series of rules for its own government. The following provisions were included:

1. All hearings would be public except when a majority vote called for an executive session.
2. No witness would be examined without the presence of at least two members of the sub-committee and one member of the committee staff.
3. A stenographic record of all testimony would be made and transcripts would be available for interested parties at cost.
4. No part of the testimony taken in executive session would be made public without making the entire record public.
5. Witnesses might have counsel present and might seek advice of counsel about the answering of questions.
6. Each witness would be permitted to talk at reasonable length and to file a sworn relevant statement that would become part of the record and, if a prescribed time schedule was met, to read a summary of it before the subcommittee.
7. Persons adversely affected by any testimony might submit relevant sworn statements for the record.[45]

43. *Ibid.*, p. 176. 44. See *Sinclair* v. *United States*, 279 U.S. 263 (1929).
45. Summarized from an editorial in the *Washington Post*, April 8, 1948.

The right to cross examine defamatory witnesses and various other proposed remedies were not included in the list. Even so, this subcommittee action demonstrated the fact that Congress itself could easily slough off the abusive practices if it so desired, without seriously hampering the performance of legitimate functions. Self-respecting and responsible committees can take such action without direction of any sort.[46] Other committees ought to be coerced into conformity by the house they represent.

The discussion herein illuminates many, but by no means all, of the problems of personnel, mechanism, and tradition which determine the character of the legislative process in Congress. Among additional items an account could be given of the rare occasions on which the House of Representatives impeaches a government official and the Senate sits as a Court of Impeachment to try the charges. The process of congressional voting by slow-moving roll call could be discussed in contrast with operation of an electrical system of recording votes which is applied in some states — but which would eliminate the delaying periods wherein, as the roll is called, important political negotiations oftentimes take place. The process of "log rolling," wherein members or groups of members agree to vote for particular measures in order to gain the support of other legislators for their own measures, belongs in the picture. Enough has been said, however, to indicate the variety and also the flexibility of the arrangements by means of which Congress does its work. Congress changes its machinery from time to time, but it does so slowly and reluctantly, and only as changes in external circumstances make adjustments necessary.

References

Franklin L. Burdette, *Filibustering in the Senate* (Princeton University Press, 1940).

Joseph P. Chamberlain, *Legislative Processes; National and State* (Appleton-Century, 1936).

Marshall E. Dimock, *Congressional Investigating Committees* (Johns Hopkins Press, 1929).

Robert L. Farrington, *The Limitations upon The Delegation of Power by the Federal Legislature* (Catholic University of America Press, 1941).

John T. Flynn, *Meet Your Congress* (Doubleday, Doran, 1946).

George B. Galloway, *Congress at the Crossroads* (Crowell, 1946).

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46. A Senate resolution passed in February, 1950, directing investigation of disloyalty in the Department of State contained a provision that if the report of the committee to the Senate was to include formal charges against any individual, "then the committee, before making such recommendations, shall give said individual open hearings for the purpose of taking evidence or testimony of such charges." *Congressional Record* (temporary daily edition), Feb. 22, 1950, pp. 2194–5. This committee gave accused persons ample opportunity to reply to charges but it was unable adequately to repair damage to reputations of innocent persons resulting from irresponsible "shotgun" charges made by a rampant member of the Senate.

It is an ironic fact that members of Congress who are callous and complacent in the face of undeserved and unrecompensed injury done to the reputations of non-members are exceedingly sensitive to any slur on their own reputations. Members guilty of casting aspersions on fellow members are quickly called to account under rules enforced by each house.

George H. Haynes, *The Senate of the United States: Its History and Practice*, 2 vols. (Houghton Mifflin, 1938).
Gladys M. Kammerer, *The Staffing of the Committees of Congress* (Bureau of Research, University of Kentucky, 1949).
Estes Kefauver and Jack Levin, *A Twentieth Century Congress* (Duell, Sloan and Pearce, 1947).
Robert Luce, *Legislative Principles* (Houghton Mifflin, 1930).
———, *Legislative Problems* (Houghton Mifflin, 1935).
———, *Legislative Procedure* (Houghton Mifflin, 1922).
Ada C. McCown, *The Congressional Conference Committee* (Columbia University Press, 1927).
Martin N. McGeary, *The Developments of Congressional Investigative Power* (Columbia University Press, 1940).
August R. Ogden, *The Dies Committee* (Catholic University Press, 2nd rev. ed., 1945).
Floyd M. Riddick, *The United States Congress; Organization and Procedure* (National Capital Publishers, 1949).
Lindsay Rogers, *The American Senate* (Knopf, 1926).
T. V. Smith, *The Legislative Way of Life* (University of Chicago Press, 1940).
Volta Torrey, *You and Your Congress* (Morrow, 1944).
Harvey Walker, *The Legislative Process; Lawmaking in the United States* (Ronald Press, 1948).
Roland Young, *This is Congress* (Knopf, 2nd ed., 1946).

13

The Leadership of Congress

Because the citizens of the United States can not themselves meet in one vast assemblage to decide what the federal government shall do and how it shall do it, we elect ninety-six senators and four hundred thirty-five representatives for that purpose. Even bodies of these sizes have difficulty in transplanting the conflicting ideas and desires of their members into creative compromise and positive action. The reaching of agreement in one house, furthermore, does not necessarily mean that the other house will reach agreement at all, or that if it does so it will reach an identical agreement. Popular election of representatives to Congress only partly solves the problem of getting the will of the people expressed in positive action. Because Congress is slow to reach agreement, people who want action in a hurry argue either for a shift of power to a one man executive, the President, or for devising forms of leadership in Congress which might greatly speed its action. The machinery of presidential leadership in terms of the executive authority of the President will be more fully discussed in other chapters. The purpose of this chapter is to discuss congressional leadership by or through political parties whether or not the President be involved as a party leader.

PARTIES IN CONGRESS

Party Obstruction to Agreement. A great deal has been said in recent years about the need for improvement of party leadership in Congress. This position will be discussed at length, but first we must note as part of the historical background the fact that political parties are first of all symbols of division rather than of unity. The first great national party, the Federalist party, was organized to put over a program. Its organization was necessary not as a mere matter of mechanics but because a lot of people were opposed to its program. The party of the Jeffersonian Republicans was organized to carry on political warfare with the Federalists. A chief function of the major political parties since that time has been to divide the people into two opposing political camps. Each party has vested interests opposed to the interests of the other party and perhaps of the country as a

whole. As was shown in an earlier chapter, it functions in Congress as a pressure group much as do other groups, except that it has a status others do not have. The party is the only pressure group with a recognized right to determine the organization of Congress and the seating of its members.

In these and other current operations its function remains that of division rather than of unity. Democrats sit on one side of the house and Republicans on the other. Either the Democrats or the Republicans succeed in electing all the officers. One party gets patronage and the other gets none. One gets committee chairmanships and the other gets none. One party can count on the use of house machinery in its own behalf while the other can expect to be discriminated against where party issues are at stake. As a matter of party loyalty, almost any Congress will give a measure of support to a President who happens to be one of its members. By contrast, unless the time be one of great national crisis, a measure sponsored by a President of the opposing party is likely to be stigmatized as unworthy of enactment without drastic revision. In large part the function of the minority party in Congress is to oppose the important measures sponsored by the majority party — and to find plausible grounds for that opposition. This is true in general, even though diverse local needs break down party harmony on particular issues and even though national interests sometimes require legislators to rise above party considerations and take bi-partisan or non-partisan action. When the majority party in one or both houses of Congress is not that of the President, additional problems arise; but in any event party considerations continue to influence and often to dominate legislative strategy.

To illustrate relations between majority and minority parties, during most of the period between the administrations of Woodrow Wilson and Franklin D. Roosevelt, the Democrats were the minority and opposition party in Congress. As of the 1930 election their position changed, for they captured control of the House of Representatives. Then for the first time they were able to frustrate the Republican Senate and the Republican President — for the first time, that is, except as divisions among Republicans had now and then enabled Democrats to control the balance of power. When toward the end of his administration President Hoover proposed plans for reorganizing administrative agencies to promote efficiency and economy, the Democratic House frustrated the plans, not because of fundamental opposition to them but because it wanted to leave reorganization to the incoming Democratic administration.

With 1933 the situation changed, and the Democrats controlled the presidency and both houses of Congress. While the Republicans remained in the minority position, they were largely ineffective except as they helped demonstrate national unity by supporting war measures and the bi-partisan foreign policy. With the election of 1946 they captured control of both houses for a single two year period. They then seized national leadership by enacting measures curbing the rights of labor, reducing taxes, and otherwise implementing the conservative ideas held by most of their group,

ideas opposed to those of the Democratic leadership or, at any rate, of the President. The Republicans thus hampered the effectiveness of Democratic leadership in the presidency. President Truman's "bad Eightieth Congress" was bad because it refused to accept Democratic leadership and to implement Democratic ideas. The election of 1948 returned Democrats to power in both houses of Congress and in the presidency, and the Republican party once more assumed the minority position where its principal function was to oppose the Democrats.

Parties as Instruments of Unity. Although party divisions symbolize the dividedness rather than the unity of the country and tend to perpetuate and enhance division, they do to some extent help to eliminate some dissenters from the decision-making process in Congress, and they may thereby speed the making of final decisions. If for example the ratio of Democrats to Republicans in Congress is three to two, and if Democrats may be counted on to stand together on a bill under consideration, then two-fifths of the membership may immediately be eliminated from the decision-making process. Participation of the minority, in this hypothetical case the Republicans, can be limited to verbal protest, and even this can be held to discussion on the floor. Only among the other three-fifths is it necessary to strive for agreement. If the majority party can act with relative unanimity, then an appearance of efficient party leadership in Congress is presented.

Actually the majority party seldom displays such unity. The major parties, pressure and interest groups in themselves, are in turn aggregations of smaller pressure and interest groups with diverse needs and desires. Seldom do all their representatives find it possible to act together. But if they fail to act together, say some critics of Congress and of our political system, then something ought to be done about this failure. We should reorganize our parties so that all segments of each party stand roughly for the same policies, we should develop new party leadership, we should educate our people for more intelligent participation in party politics, and we should bring about such party unity in Congress that party government actually prevails. It is the purpose of this chapter to portray at length the methods by which limited party leadership is achieved and to provide some basis on which to appraise the argument for expanding the scope of that leadership.

PARTY MACHINERY IN CONGRESS

Top Leadership. Since the offices which Congress sets up for its own operation are always occupied by members of the majority party, and since that party has majorities on all committees, the official machinery of Congress may be regarded as party machinery as well. The principal exception is the presiding officer of the Senate, who is the Vice President of the United States. In the person of a John N. Garner, Franklin D. Roosevelt's first Vice President, he may exercise highly effective party leadership

in the Senate while at the same time maintaining liaison with the White House. A Charles G. Dawes, on the other hand, who was Vice President under Calvin Coolidge and who lacked the skills of politicians familiar with the elective process, may have relatively little influence. The same is true of any Vice President who happens to be in office at a time when the opposing political party happens to have a majority in the Senate. If there happens to be no Vice President, as when that official has succeeded to the presidency, then a president pro tempore, the choice of the majority party in the Senate, acts as presiding officer. This position, as when occupied during the Eightieth Congress by Senator Arthur H. Vandenberg, may be extremely influential. The comparable position in the House of Representatives, which is discussed at length below, is the speakership.

Each house has a majority leader and a minority leader, who are chosen respectively by the majority and minority parties in each house. In the language of Representative Charles A. Plumley,

> The [majority] leader is all the title implies. He leads in party debate, brings forward party programs and policies. His advocacy of or opposition to proposed legislation indicates the party preference. The majority leader has much control over what comes up, and when, on the legislative program from week to week. When he makes a motion it is nearly always carried. He usually makes the motion to adjourn, and it always carries. If someone else, not authorized to do so, makes a motion to adjourn, it is nearly always defeated.[1]

The minority leader provides comparable leadership for the minority party.

In each house also there is an assistant majority leader and an assistant minority leader, who are more commonly called whips.

> The whip is not an official position. It is a party designation. Both parties have their whips. The whip looks after the membership of his party, advises them of weekly programs, and endeavors to have all present when important measures are to be voted upon. When the vote is apt to be close, the whip checks up, finds out who is out of the city, and advises the absent members by wire of the important measures coming up.
>
> The efficacy of the majority in securing the legislation it desires and of the minority in making felt its opposition depends upon the efficiency of the party machinery on the floor. The party whips are vital cogs in this machinery.[2]

Steering Committees. In addition to the officers here listed, each party has long had in each house a flexible and changing group including these and other members called a steering committee to plan strategy and tactics. The size of each steering committee, its strength, and its activities vary from situation to situation and depend considerably on the personalities of the various influential people in the house and party in question. The majority steering committee in the House is characterized as "a little party adjunct to help promote legislation the majority is interested in, and to help iron out a program of procedure, especially in the closing days of a ses-

1. *Congressional Record* (temporary daily edition), May 5, 1950, p. 6634.
2. *Ibid.*, p. 6634.

sion." [3] In the Senate and to a lesser extent in the House of Representatives there is a tendency toward replacement of steering committees by party policy committees, which are discussed below. In the House of Representatives, furthermore, much of the work of planning the legislative program is done by the Committee on Rules, which is discussed at length herein. Before discussing such machinery in operation, however, it is necessary to take up the caucus, from which derives the power of party leaders in each house.

The Caucus. As the term is used here a caucus is an organization of all the members of one political party in one legislative house. To avoid confusion the term is used for similar agencies in both major political parties, though the Republican party prefers the term "conference," contending that a caucus has power to bind the votes of its members on legislative matters whereas the Republican "conference" exercises no such power. It is in the caucus that final decisions are made on slates of officers to be chosen, allocation of committee positions, and distribution of the patronage available in each house. It is in the caucus that party members gather occasionally to decide what position the party will take on controversial measures. The caucus is concerned almost exclusively with the welfare of the party and of party members.

Each caucus chooses its own officers. It names a "committee on committees" which allocates committee positions to party members. The caucus of the majority party has a committee on patronage for distributing to party members the patronage of its house, including positions for doorkeepers, pages, elevator operators, and workmen of various kinds.

The caucus may expel members from the group but not, of course, from Congress. It may deprive a member of patronage or, what is more serious, it may demote him as a holder of committee positions or deprive him of them altogether. Although the leaders like to keep control of caucus membership and would willingly use punishing devices to that end, it may be bad strategy to do so. Such action emphasizes and advertises division within the party, and it may antagonize voters and drive them to the other party. On the rare occasions when punishment is administered, it is likely to be for refusal to support the party in elections rather than for refusal to follow party leadership in support of a legislative program.[4] An example of such punishment occurred after the presidential election of 1924, when certain senators who had bolted the Republican leadership to support the Progressive candidate, Robert M. LaFollette, Sr., for President were expelled from the Republican caucus and deprived of their committee posts. The action was of doubtful benefit to the party, however, and most of the rebels had their rights restored at an early date.[5]

3. *Ibid.*, p. 6635.
4. For discussion of caucus disciplining of recalcitrant members see Clarence A. Berdahl, "Some Notes on Party Membership," *American Political Science Review,* vol. XLIII (April, June and August, 1949), pp. 309–21, 492–508, 720–34.
5. *Ibid.*, pp. 492–503.

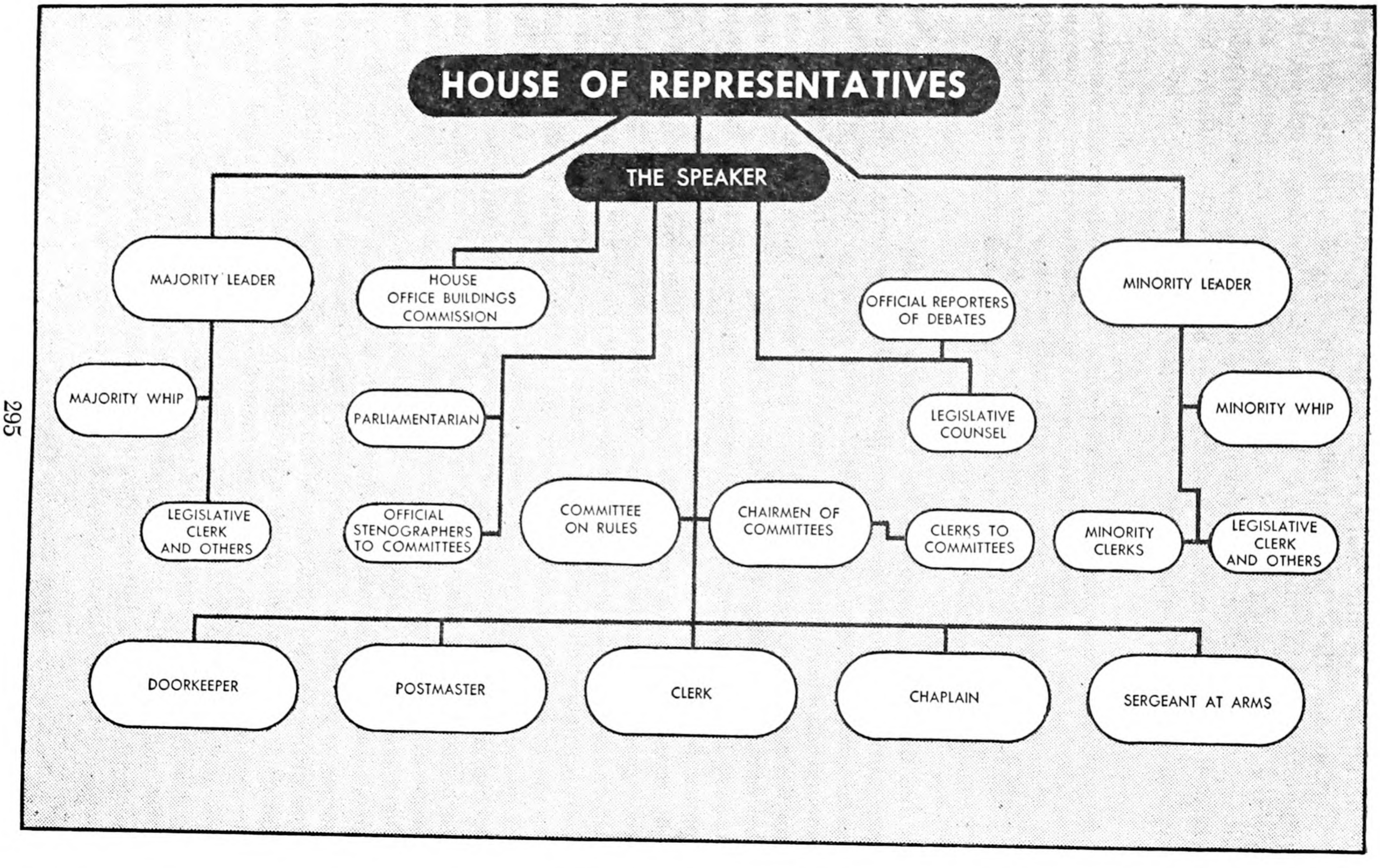
During the administration of Woodrow Wilson the Democratic caucus concerned itself not only with elections and the distribution of offices and positions but also with the legislative program. It decided the stand of its members on important measures such as the Federal Reserve Act and the Federal Trade Commission Act and then went to the floor of the house with a relatively united body. A member could refuse to abide by the caucus decision if he had made prior pledges to the contrary or if the political situation in his home community made his political survival dependent upon his doing so, but by and large the action of the caucus was controlling. The caucus as used in this fashion was therefore a tremendously powerful instrument. Liberty-loving members and members with interests of their own to serve do not like to be controlled in this fashion, however, and caucus proceedings for this purpose have largely gone into disuse. The recent demand for revival of the caucus to control legislative voting of party members will be discussed following the discussion of the Speaker of the House and certain other instruments of party power.

The Speaker of the House. The speaker of the House of Representatives, along with the House Committee on Rules with which he works closely, is of course an instrument of the House as well as of the party caucus which presents his name to the House for an assured election. His leadership of the House and of his party in it is so consolidated that both must be treated together. The speakership has always been an important office. Its power was greatly increased in the late 1880's and during the 1890's, partly as a result of the dynamic leadership of Speaker Thomas B. Reed, and partly as a result of the sheer necessity of streamlining the organization of the House in order to get legislation enacted. Since the Civil War the responsibilities of Congress had rapidly increased with the growth of the population and with the development in industry and agriculture which called for the attention of the federal government. The machinery of Congress was slow to adjust to changing needs. Writing during the early 1880's Woodrow Wilson sharply criticized the uncoordinated control over legislation which was exercised by the chairmen of standing committees.[6] Furthermore, by use of "dilatory motions" and other devices, minorities were often able to frustrate action on important bills.

During the 1880's Speaker Thomas B. Reed, known to history as "Czar Reed," secured the adoption of rules which greatly speeded House action at the expense of the rights of individual members and which gave to the speaker virtually dictatorial power over the House through his selection of and his membership on the Committee on Rules, his power to recognize or refuse to recognize members, and other devices.[7] The powers were abused

6. Woodrow Wilson, *Congressional Government* (Boston: Houghton Mifflin Company, 1885), pp. 60–61.

7. For discussion see Samuel W. McCall, *The Life of Thomas Brackett Reed* (Boston: Houghton Mifflin, 1914), chapter XIII. See also William A. Robinson, *Thomas B. Reed, Parliamentarian* (New York: Dodd Mead, 1930).


HOUSE OF REPRESENTATIVES
THE SPEAKER
MAJORITY LEADER
MAJORITY WHIP
LEGISLATIVE CLERK AND OTHERS
HOUSE OFFICE BUILDINGS COMMISSION
PARLIAMENTARIAN
OFFICIAL STENOGRAPHERS TO COMMITTEES
COMMITTEE ON RULES
CHAIRMEN OF COMMITTEES
CLERKS TO COMMITTEES
OFFICIAL REPORTERS OF DEBATES
LEGISLATIVE COUNSEL
MINORITY LEADER
MINORITY WHIP
MINORITY CLERKS
LEGISLATIVE CLERK AND OTHERS
DOORKEEPER
POSTMASTER
CLERK
CHAPLAIN
SERGEANT AT ARMS

by his ultra-conservative and narrowly politically-minded successor, "Uncle Joe" Cannon. The "Cannon revolt" of 1910, waged by Democrats and progressive Republicans against the Republican speaker, weakened his position by depriving him of his Rules Committee membership and attempted to transform him from a party instrument into a mere presiding officer.[8] Cannon, in partial defeat, states as follows his very different conception of the office, a conception which many people continue to hold:

> The Speaker does now believe, and always has believed, that this is a government through parties, and that parties can act only through majorities. The Speaker has always believed in and bowed to the majority in convention, in caucus, and in the legislative hall, and today profoundly believes that to act otherwise is to disorganize parties, is to prevent coherent action in any legislative body, is to make impossible the reflection of the wishes of the people in statutes and in laws.[9]

The Committee on Rules. The Cannon revolt deprived the speaker of part but not all of his power over the legislative program of the House of Representatives. Any man influential enough to be elected speaker has enough influence with his party caucus largely to determine the choice of members for the Committee on Rules. Even though he is no longer a member of that committee, the speaker works in close collaboration with it and usually has its support in critical matters. This committee, to which great power over the legislative program is allocated, is a kind of traffic officer for the House. From the many bills which have been favorably reported by the several legislative committees, the Committee on Rules picks those which are to be considered on the floor of the House, and among competing bills it establishes priorities.[10] It decides how much time shall be allotted to the consideration of a particular bill and the conditions under which amendments may be proposed and discussed. In a body as large as the House of Representatives, these functions must be performed by some such agency, and there would be little criticism of the committee if the scope of its powers were carefully defined and if it were content with the legitimate exercise of its powers. If a majority of its members disapproves of a measure which has been reported by a legislative committee, it may refuse to permit the bill to be brought to the floor at all or may insist on modification to suit the Rules Committee as a condition of finding a place for it. It is as if a policeman in directing traffic shunted aside certain cars he disliked and refused to permit them to proceed, or permitted them to proceed only after they had been repainted to satisfy his taste.

The Rules Committee reached the height of its restrictive powers during 1947 and 1948, when it was under Republican leadership. An example was its bottling up of a bill providing for universal military training which was reported by the House Armed Services Committee in July, 1947, and on

8. See L. White Bussey, *Uncle Joe Cannon* (New York: Henry Holt, 1927).
9. *Ibid.*, p. 3437.
10. Large numbers of non-controversial bills are passed by unanimous consent and do not have to be policed by the Committee on Rules.

which the chairman of the Rules Committee, Leo E. Allen, who was opposed to universal military training, refused to permit action. In February, 1948, former Supreme Court Justice Owen J. Roberts wrote to Allen accusing him of legalistic jockeying and declaring that such action was "a travesty of the American system of government." Said Roberts, it was the function of the Armed Services Committee and not of the Committee on Rules to determine what legislation in this particular field should be brought before the House for consideration:

> It was never intended that the Rules Committee should exercise the power of veto over the action of the other committees of the House. Yet, that is precisely what the Rules Committee has done for eight months. This is precisely what I am reluctantly forced to conclude, you intend to continue to do.[11]

Representative Allen refused to yield, declaring that the former justice was "wholly misinformed as to legislative procedure." He pointed out that the House could bring the measure to the floor at any time through a motion to discharge the Committee on Rules of further consideration of the bill, which motion could be brought on the basis of the signatures of 218 members of the House. He saw no evidence that there was any great desire on the part of the membership to have the bill brought up for consideration.

It is true that the bill could have been brought out of committee in this manner, and in all probability the Rules Committee would have reported the bill to the House without the coercion of a motion to discharge had there been evidence that a large percentage of the members had given thought to the matter and wanted the bill brought up for consideration. When a legislative body is preoccupied with many matters all of which clamor for attention, however, it is hard to get it to take action to circumvent the operation of its regular machinery. The Rules Committee is in a position to engage in a great deal of obstruction before the body which it ought to be serving will trouble to sweep the obstruction aside. In the instance of the military training bill mentioned above, the speaker and the majority leader finally put enough pressure on certain members of the Rules Committee to get the bill reported out.[12] The report was not made until June, 1948, however, and by this time it was too late to secure enactment of the measure at that session of Congress.

The 1949 Amendment. Resentment against obstruction by the Rules Committee had been accumulating since the middle 1930's when President Roosevelt and other New Dealers denounced it for obstructing the New Deal program. When in January 1949 the Democrats returned to power in the House of Representatives after two years as the minority party, they came back with a determination to clip the wings of the Rules Committee.

11. *New York Times*, February 19, 1948.
12. See Arthur Krock, "Sources of Power of the Rules Committee," *New York Times*, June 15, 1948.

For this purpose the Democratic caucus voted to support an amendment providing that if a bill reported by a legislative committee had been before the Rules Committee for twenty-one days without action by that committee, the chairman of the legislative committee might call up the bill on any second or fourth Monday for consideration by the House. It was said that "for the first time in 10 years, the caucus voted to bind the members present in accord with the action taken unless they had given their voters specific pledges to the contrary." [13] The amended rule was adopted by the House, and a substantial number of Republicans supported it.

The House of Representatives had no more than performed its wing-clipping operation on the Rules Committee when people began to see that the committee, obstructionist as it had been, had not been merely an irresponsible body frustrating the will of the majority of the House. A former chairman of the committee, whose reelection to Congress President Roosevelt had successfully opposed because of obstruction of New Deal measures, declared publicly that on certain measures which he had held up the President had talked favorably in public but had asked House leadership to hold back. The President and the First Lady, he said, had been refused, usually politely, some of the unique legislation which they fathered and mothered.

> More often, however, what the then President loudly proclaimed as legislation, denied by the autocratic Rules Committee, were the particular bills, which he praised publicly, but damned privately, and which he begged the leadership of the House not to let the damn things come to me. Exhibits — the Frazier-Lemke farm mortgage inflation bill, championed by Father Coughlin, the amendments of the Walsh-Healey bill, and other labor proposals, such as minimum-wage bill, which he likewise beseeched the Rules Committee to block, steadfast, behind the closed doors of its star chamber.[14]

During 1949 it became apparent that not only the President but the House of Representatives itself had been accustomed to rely on the Rules Committee to block bills which had been driven through legislative committees by powerful lobbies and to which large numbers of representatives were opposed but for political reasons would not dare vote against. For instance, the Committee on Veterans' Affairs reported a bill for huge pensions for veterans of World War II. The Rules Committee, faced with a bill providing for an initial annual expenditure on veterans of more than $62 million and an ultimate expenditure of $125 billion by the year 2000, refused to give a green light to the proposal. John E. Rankin, chairman of the Committee on Veterans' Affairs, was said to have planned using the amendment device to force the hand of the Rules Committee when he discovered that there was in this instance an easier device for getting the measure to the floor. The pension bill reflected such a violation of good statesmanship that by a majority of a single vote the House sent the bill

13. Marquis Childs, "Washington Calling," *Washington Post,* January 4, 1948.
14. *Congressional Record,* January 27, 1949, vol. 95, part 12, p. A347.

back to the Committee on Veterans' Affairs "for further study." [15] Although a special loophole was available in this instance for getting around the Rules Committee, some people began to wonder whether they had been overzealous in restricting the committee's power.

The 1950 Struggle. In January 1950, a coalition of Republicans and Southern Democrats attempted to restore fully the restrictive power of the Committee on Rules. The movement was backed by Southern Democrats who wished to block President Truman's Civil Rights Program, which was intended largely to insure equality of civil rights to Negroes, and by many Republicans and some Democrats who wished to restrict the President's fair deal program generally and particularly to curtail social measures providing for vast federal expenditures. When on January 20, 1950, the proposal to repeal the twenty-one day rule came before the House, there was so much maneuvering by the two major parties and by different factions within them that it was nearly impossible to follow the course of the struggle. Representative Sabath of Illinois, chairman of the Committee on Rules, presented the resolution for repeal of the twenty-one day rule under dictation from his committee, but he declared his indignant opposition to it and denounced the "present unholy alliance formed by the reactionary Democrats and reactionary Republicans on the Committee on Rules" which supported the proposal.[16] Republican Representative Wadsworth of New York argued on a high plane for repeal of the rule. During 1949, he said, the Rules Committee had been disturbed by the piling up of bills providing for federal expenditures. The committee found that if all the pending bills, other than those providing for the Marshall aid program and for military aid to Western Europe should pass, the annual financial obligation of the federal government would be increased by $9 billion.

> And bills came pouring in on us — pouring over from the Senate, pouring out of our own standing committees — bill after bill. The trouble is, of course, that under the present rule it is utterly impossible for the standing committees of the House to get together and estimate what the aggregate of their proposals may be — what effect they will have upon the finances and economic condition of the country.
>
> For 40 or 50 years that job was left to the Committee on Rules because only to that committee came all the bills. That committee could sit there and watch the trend and make its recommendations in one form or another — to the effect that we had better go slow in this direction, because we are going too far and going too fast.[17]

This problem of the control of the total of federal expenditures was brought up again and again without adequate discussion of whether a Committee on Rules which was set up not to control policy but to act as a traffic officer was the proper instrument for dealing with the problem. There was no discussion of the crippling bias of the committee or of other

15. See *New York Times,* March 25, 1949.
16. *Congressional Record,* Jan. 20, 1950, vol. 96, part 1, p. 706.
17. *Ibid.,* p. 709.

relevant factors. Representative Allen who, when the Republicans had been in power in the House, had been chairman of the Committee on Rules declared that

> The issue is whether or not the entire Truman socialistic program will succeed or be defeated. I refer especially to the socialization of medicine and the socialistic Brannan farm plan.[18]

He concluded,

> Do you for a moment believe that the left-wingers would be opposed to this resolution if they thought they could get their socialistic program easier with its adoption? Of course not.[19]

Speaker Sam Rayburn, who had left the chair for a position on the floor, arose to answer Allen. Allen, he said, had laid down the issue: "Whether or not the program of the successful party in the last campaign is going to be sabotaged. That is what he said in so many words. Who won the election in 1948, anyhow?" He declared that "the rules of a legislative body should be such at all times as to allow the majority of a legislative body to work its will."[20] When a legislative committee of the House had labored long and honestly and had brought out a bill and asked for the privilege of trying their case before the elected representatives of the people, he contended, there should be something in the rules of the House to make it possible to bring out the bill. The resolution was rejected, and the twenty-one day rule remained in force until January, 1951, when the rule was eliminated and the full power of the Rules Committee was restored.

The Speaker and the Twenty-One Day Rule. Although the twenty-one day rule seemed to require that the Speaker of the House recognize the chairman of a legislative committee when he sought to bring up a bill under the rule, it did not dictate his choice among various chairmen who might seek recognition for that purpose. If the Rules Committee held back many bills beyond the twenty-one day period, as it normally did, and if the chairmen of those committees sought to bring the bills up for discussion on the second and fourth Mondays when the rule was operative, it was the speaker who decided which measure should come before the House. This discretion on the part of the speaker left him in a position of "czardom" somewhat comparable to that which he occupied prior to the revolution of 1910. On January 23, 1950, for example, after the House had refused to eliminate the twenty-one day rule, it was at first assumed that Speaker Rayburn would have to recognize Chairman Lesinski of the Committee on Education and Labor to bring up what was known as the FEPC bill. Having reached the conclusion that the political atmosphere conditioned by the fight over the rule would not be "salubrious" for consideration of the FEPC bill, Speaker Rayburn ignored Mr. Lesinski, however, and recognized Chairman Peterson of the Committee on Public Lands who wished to bring up a bill for the admission of Alaska to statehood.[21] Pre-

18. *Ibid.*, p. 707. 19. *Ibid.*, p. 707. 20. *Ibid.*, p. 708.
21. See Arthur Krock, "The 'Reform' Rule Seems Less Democratic Now." *New York Times*, January 24, 1950.

sumably the speaker could prevent indefinitely consideration of a measure to which he was opposed if chairmen of other committees continued to seek recognition for similar purposes. It is apparent, therefore, that the House of Representatives has thus far been unable to devise ways of preventing the exercise of arbitrary power by the speaker or by the Committee on Rules or by both without depriving them of powers which need to be exercised if the cumbersome machinery of the House is to be kept in operation. Both the speaker and the committee are party instruments, but they often fail to act effectively as such because the parties are so divided that they can sponsor no consistent line of policy.[22] If they wish to do so, party members can use the party caucus to bind the speaker, the Committee on Rules, and all other members and organizations of the House to a given line of conduct. In actuality, however, the speaker and a few other officers, usually including members of the Rules Committee, are likely pretty much to dominate the caucus. Superficially, at least, they control the caucus quite as fully as they are controlled by it. When, as in recent years, little use is made of the caucus, this group can often dictate party policy with the support of those factions which are in sympathy with it. There is no simple picture, therefore, of the leadership of Congress through the use of well organized and democratic party machinery.

POSITIVE PARTY PROGRAMS

Policy Committees. Gradual dissatisfaction has developed, both in and out of Congress, with the mere item by item handling of legislative matters without over-all planning of programs. A general demand for more systematic planning in Congress developed with the organization of planning groups in the government, in business, in labor, in universities, and in other institutions to take into account the problems to be faced after the termination of World War II. In January, 1945, Robert Heller, a management engineer, published as a pamphlet of the National Planning Association a brief treatise entitled *Strengthening the Congress.* He offered a list of fourteen recommendations for the strengthening of Congress, among which was the establishing of majority and minority policy committees in each house for working out party policy and legislative programs. The recommendation attracted the attention of various people interested in making Congress a more effective instrument of democracy. Among these were members of Congress and others who disliked what seemed to be the dominant trend in legislative-executive relationships whereby Congress was expected by and large to rubber-stamp programs worked out in the executive branch. As stated by Representative Voorhis in March, 1945, before the Joint Committee on the Organization of Congress, "there was a wide body of opinion of the country which, for a variety of reasons, had begun

22. Because seniority is important in the selection of a speaker and because of the long tenure of Democratic representatives from the South, Democratic control of the House is likely to mean election of a southern representative as speaker, with all that such election means as to effect on legislative policy.

to take the position that a member of Congress was to be judged as good or bad, depending upon the degree to which he had supported the proposals of the administration." [23] Voorhis thought the reason for this attitude was "the failure on the part of Congress to devise on its own motion, as it should do, constructive legislative programs to meet the needs of the nation instead of merely saying, 'No.'" He thought, for example, that at the beginning of the war Congress ought to have devised its own policies on financing the war. It had not been in a position to offer any such program. Because of the lack of well planned programs on the part of Congress or of members of Congress, it had come to be assumed that the bills worthy of most serious attention were those which came to Congress under the sponsorship of executive agencies. Voorhis argued that "the central function of any national legislature should be the devising of a national legislative program with all that that implies." He found need, therefore, for a House committee which would consist of chairmen of the more important committees, together with the speaker and the majority leaders, and which would have the function of laying out broad legislative programs with the over-all national picture in view.

> I believe other members ought to be able to freely appear before meetings of such a committee, so we would have a scheme whereby the Congress itself would arrange its program with a view to the future ahead of the immediate present and would be planning its immediate action in the light of the over-all problem of the nation.
>
> I do believe we are too much inclined to focus our attention on the next appropriation bill, the immediate jobs that have to be ground out in the legislative mill and have left to an all too great an extent to the executive the function of taking this over-all view of the national problem as a whole.
>
> And this, after all, is the key to the future position of the Congress in our scheme of government. For the main reason for such decline in power of Congress relative to the executive as has taken place is the fact that the executive has become the agency of government taking an over-all view not only of the nation's immediate problems, but also of its long-run future needs.[24]

He thought that both the majority and minority parties should have policy committees of this kind.

The proposal for establishing policy committees received a great deal of favorable attention in Congress, and a provision for their establishment was included in the Congressional Reorganization Act of 1946 as it passed the Senate. It ran into obstructions, however, when it reached the House of Representatives. The majority and minority leaders and other officers were suspicious of this and other devices which might interfere with the exercise of their power. Said George Galloway, discussing the action of the speaker,

> As presiding officer of the House and high priest of its rules, he was naturally deeply interested in the proposed changes. As the central figure in

23. *Organization of Congress*, Hearings, Joint Committee on Organization of Congress, 77th Cong., 1st sess., p. 30.
24. *Ibid.*, p. 28.

policy making in the lower chamber, he faced a probable diminution of his power through the functions to be assigned to the proposed seven-man majority policy committee. As one of the "Big Four" who meet every Monday with the President while Congress is in session to consider the legislative program, perhaps he saw no need of superseding these smoothly working informal conferences by a formal joint legislative-executive council. And so these important sections of the bill had to be deleted before it could leave the speaker's table and receive the blessing of the Rules Committee.[25]

The Senate Policy Committees. Neither the Vice President of the United States when he presides over the Senate nor the President pro tempore of the Senate has political power comparable to that of the speaker of the House of Representatives. Nor does the Committee on Rules of the Senate exercise power comparable to that of the House Rules Committee. The course of legislation in the Senate has always been directed much less formally than in the House. There was, consequently, no such obstruction to the creation of new machinery in the Senate as in the House, and the Senate had come to feel the need for more adequate planning of its legislative program. Therefore, when the provision for majority and minority policy committees in both houses was deleted from the Legislative Reorganization Act of 1946, the Senate quietly inserted in an appropriation bill a provision for Senate majority and minority policy committees, and the provision was enacted as part of the statute. The act provided

> for maintenance of a staff for a majority policy committee and a minority policy committee in the Senate, consisting of seven members each, for the formulation of over-all legislative policy of the respective parties, the members of such staffs to assist in study, analysis, and research on problems involved in policy determinations. . . .[26]

The Senate Republican Policy Committee. The elections of 1946 brought the Republican party into power in Congress. It was the Republicans, therefore, who first utilized the policy device. The Republican Senate organized its committee under the leadership of Senator Robert Taft and used it to formulate Republican policy in the Senate as contrasted with the legislative policy of the then Democratic President of the United States, and to plan various items of party strategy.[27] The committee built up a substantial professional staff to help work out its program.

25. George Galloway, *Congress at the Crossroads* (New York: Crowell, 1946), p. 345.
26. 60 Stat. 911.
27. Professor Gladys Kammerer summarizes as follows the tasks performed by the committee: "canvassing the range of legislation pending before the standing committees, examination and recommendations regarding specific bills, scrutiny and recommendations on presidential nominations of national and party importance, formulation of broad legislative policy based on party unity through reconciliation of divergent views of Senators on legislative measures, discussion with individual Senators of measures of special interest to them and of importance to the nation and party, consideration of tactics and parliamentary strategy, scheduling of measures for consideration, advice on institution of committee investigations, recommendations to call the Republican conference when necessary, and preparation and issuance of broad statements of policy on matters of national and party importance after decisions had been reached by the conference." Gladys M. Kammerer, *The Staffing of the Committees of Congress* (Lexington: University of Kentucky, 1949), pp. 36–37.

Two years constituted too brief a period to measure the full potential of leadership in the Senate Republican policy committee. Republican leaders during the period were concerned primarily with curbing the influence of the Democratic administration and winning the election of 1948 rather than with getting underway immediately with any considerable legislative program. With the Republican defeat in the elections of 1948, the majority policy committee became the minority policy committee. When Congress reassembled in January, 1949, liberal Republicans in the Senate attempted to liberalize the character of their policy committee by electing Henry Cabot Lodge, Jr. to its chairmanship in the place of Senator Taft. They failed in this move, but as a compromise they did succeed in getting certain liberal appointments to the committee. The controversy demonstrated the fact that a policy committee of this kind must inevitably serve either as the instrument of one faction in a divided party or must reflect factional divisions within itself and to that extent be limited in its ability to offer programs satisfactory to the party.

The Senate Democratic Policy Committee. Although Senate Democrats organized their policy committee during the period of the Republican ascendancy, they made less use of it either for the statement of party policy or for research for the benefit of the party program. Unlike the Republicans, they could rely on leadership from the President, who was a member of their own party, and they made more extensive use of research staffs in the executive branch who served under the ultimate direction of Democratic politicians.[28] After the Democrats had returned to power in the Senate, an account by a member of the Democratic policy committee indicated that the group was performing functions comparable to the traffic officer functions of the Rules Committee in the House of Representatives. Noting that the great mass of bills passed by the Senate were approved unanimously, the senator continued to discuss the handling of those bills to which there was objection.

> Once a bill has been objected to and passed over, it remains on the Senate calendar. Thereafter, it becomes the duty of the majority policy committee of the Senate to determine the time at which the measure will be brought up for debate. In my capacity as the assistant majority leader of the Senate, or the whip, as the job is otherwise known, I am one of the eight Democratic senators who serve on the majority policy committee. Our job, as I've already indicated, is, first, to determine the sequence in which legislation is brought up for debate. The policy committee has the further function of mapping the general strategy which will be used in guiding the legislative program of the administration.[29]

Appraisal of Policy Committees. In neither of the major parties in the Senate has the policy committee become an effective agent for the farsighted planning of legislative programs as was originally contemplated.

28. *Ibid.*, p. 38.
29. Francis J. Myers, *Congressional Record* (temporary daily edition), January 24, 1950, p. A508.

It remains to be seen whether committees of legislators can perform such a leadership function, and whether the body of legislators as a whole can be persuaded to accept such leadership. In the House of Representatives, the Democratic leaders still insist on using managerial mechanisms with which they are familiar, as distinguished from the policy committee device. In January 1949 the Republican party in the House, which had then become the minority party, did set up a twenty-two member policy committee to take over the duties of the old steering committee,[30] but little came of it.

Early in 1950 the chairman of the Republican National Committee, Guy D. Gabrielson, attempted to use Republican policy committees along with other Republican groups in an attempt to get a unified statement of Republican party policy for use in the 1950 election. It is to be "understood that the respective party organizations in Congress are almost completely independent of the national party organizations, and still more, that the respective organizations in the House and Senate are almost completely independent of one another."[31] To aid the chairman in working out his policy statement, Senator Taft headed a Senate policy committee which conformed in part to the existing committee, and Joseph W. Martin, Jr., as Republican leader in the House, named a twenty-one member House committee.[32] Although these committees, along with committees of governors, and other organizations, and individuals within the Republican party helped to pool party opinion toward a joint policy statement, there is no very clear evidence that the committees in Congress did much to help in the formulation of a persuasive statement. Whatever their contribution, the party statement, entitled "Liberty Against Socialism," offered very little in the way of a constructive party program.[33] Establishment of the precedent, it is true, may be more important than the document itself, and the policy committees in the future may conceivably do much to unify the sentiments and the activities of parties in Congress and throughout the nation.

THE PROSPECTS FOR PARTY LEADERSHIP

Although academic and sometimes political arguments for more effective party leadership in Congress are still voiced with great enthusiasm, the difficulties in the way are at present more obvious than the achievements. Members of Congress, whatever their party, come from diverse localities with diverse local interests, and they think quite as much in terms of those localities and interests as of the label and the national program of their party. Most of them have won elections and will win elections more because of what they have done and said locally than because of what they have promised or done about unified national interests. Because the membership and the interests of party members in Congress are highly diverse, a long range major program of a party is seldom well enough articulated so that members can attach themselves to it even if they wish to. On most

30. See *Washington Post*, January 27, 1949.
31. Berdahl, *op. cit.*, p. 309.
32. *New York Times*, January 12, 1950.
33. For the statement see the *New York Times*, February 7, 1950.

bills which come before Congress there is no clearly defined party position. It is hard to make a party issue out of the number and location of new post offices to be built, the nature and extent of a program for reclamation of arid lands, the alleged need for expansion of the FBI, the alleged need for a national academy for the Department of the Air Force comparable to West Point and Annapolis, and innumerable other questions which come before Congress. There may be two sides to every question, and there may be a great many more sides than two, but this does not mean that the several sides can be juggled to correspond to any sensible statement of party principles. It is futile, therefore, to look primarily to party principles or to party leadership for a solution.

When new party members come to Washington in such numbers as to indicate that they have a popular mandate to reshape policy in Congress, they nevertheless find themselves frustrated by existing mechanisms. As new people they are unfamiliar with congressional machinery. Uncodified traditions hamper their effectiveness. They get entangled in unfamiliar rules. The bills they introduce must go to committees headed by senior members who do not owe their positions to new trends in public sentiment. The chairmen, therefore, are not likely to share the sentiments of the innovators or to speed their causes. Hostile chairmen and hostile senior members are effective barriers to objectionable legislation. Older and more experienced members of Congress can occasionally devise techniques for getting round the House Committee on Rules and other instruments of entrenched power, but new members are not likely to have any such ability.

It is not surprising, therefore, that when aggressive new members come to Congress they resent the frustration of unfamiliar machinery and advocate changing it. It is not surprising, for example, that Senator Hubert H. Humphrey of Minnesota scoffs at seniority as "the most sacred cow in the legislative zoo," and demands that his party take its position on important measures in caucus where the total party membership could dictate to committee chairmen and to such agencies as the speaker of the House and the House Committee on Rules.[34]

It may well be that sometimes, when legislation is blocked by obstreperous and irresponsible party members, coercion by the caucus would serve the interests of democracy. For extensive use, however, it would not be a satisfactory instrument. It would tend to drive still further behind the scenes the settlement of questions which ought to be debated openly. It would mean that often ill-considered party positions would be taken on matters about which party leaders and many party members had no possible concern. In other words, it would merely create an appearance of unity where there was no vital unity of interest or common judgment. It is not to be denied that, as Senator Humphrey suggests, the American people ought to inform themselves much more adequately on political issues, that

34. See his speech before the New York Herald Tribune Forum, *New York Herald Tribune*, October 30, 1949, reprinted, *Congressional Record*, (temporary daily edition), January 11, 1950, pp. A161–62.

parties ought to consider and ultimately to take positions on the dominant political issues, and that parties should be required to fulfill their political pledges. It may well be that instead of giving up policy committees as ineffective devices Congress should go on seeking their improvement and should try building bridges between the policy committees of the same party in the two houses. There is no prospect, however, that the great mass of political issues will at any early date be arranged in terms of clear and sharp division between two major parties with victory in election going now to one party and now to the other, depending upon clear and sharp divisions on the mass of issues. As long as interests and conditions in the United States remain as diverse as they now are, relatively few issues will be divisible in terms of divisions within a two party system. The parties will continue to overlap on issues, and each will continue to shelter members who, in terms of the major questions of the hour, will logically belong in the opposite camp.

This means that although party leadership in Congress can be greatly improved, Congress will not be able to rely exclusively upon leadership which is merely partisan. It will have to go on deciding innumerable questions which have no particular meanings in terms of partisan consideration, and it will have to settle other questions which, however decided, will tend to tear asunder the existing party alignments. Comforting as some think it might be to have a symmetrical division of problems and issues between Democrats and Republicans, such symmetry is not likely soon to be achieved amid the complexities of modern civilization. In large part we may expect leadership to continue diffuse and volatile, changing from situation to situation and from issue to issue.

References

Charles Atkinson, *The Committee on Rules and the Overthrow of Speaker Cannon* (Columbia University Press, 1911).

George Rothwell Brown, *The Leadership of Congress* (Bobbs-Merrill, 1922).

———, *The Speaker of the House. The Romantic Story of John N. Garner* (Brewer, Warren & Putnam, 1932).

James M. Burns, *Congress on Trial* (Harpers, 1949).

L. White Busbey, *Uncle Joe Cannon* (Holt, 1927).

Ch'ang-wei Ch'iu, *The Speaker of the House of Representatives since 1896* (Columbia University Press, 1928).

Mary P. Follett, *The Speaker of the House of Representatives* (Longmans, Green, 1909).

George B. Galloway, *Congress at the Crossroads* (Crowell, 1946).

Paul D. Hasbrouck, *Party Government in the House of Representatives* (Macmillan, 1927).

Gladys M. Kammerer, *The Staffing of the Committees of Congress* (Bureau of Government Research, University of Kentucky, 1949).

Samuel W. McCall, *Thomas B. Reed* (Houghton Mifflin, 1917).

William A. Robinson, *Thomas B. Reed Parliamentarian* (Dodd, Mead, 1930).

Jerry Voorhis, *Confessions of a Congressman* (Doubleday, 1947).

14

A Critique of Congress

As demonstrated in the preceding chapters, the institution which we call Congress is in a sense many different institutions, doing many different things. In order to explain it we must describe it from many points of view. It is a forum of the whole body of the American people, but one reduced down to the dimensions of ninety-six and four hundred and thirty-five members respectively, so that the members can meet and work together effectively. It is the architect of the existing body of statute law, but it is an architect with a perennially unfinished commission; it must go on endlessly making additions and repairs. While it is dedicated to doing the will of the American people it is peculiarly sensitive to those interest groups which can mobilize votes at ensuing elections and reward or punish legislators for their action on bills.

Congress operates according to a tradition-encrusted form of organization which changes but slowly and which is wedded with particular closeness to the device of seniority as the measure of right to position within the organization. Congress is led in part by hierarchies of officers of its own choosing, but the self-choice of officers is really party choice. Leadership is partly in the hands of the majority party, but the party is itself so divided on many matters and so dependent on seniority and other aspects of organization — and as a party it is so little concerned about so many measures that come before Congress — that its leadership is only sporadic, and it is often ineffective when it genuinely tries to lead. The President exercises some leadership by virtue of his position at the helm of his political party, but such leadership is often hampered by intra-party jealousies. He leads in part in his capacity of President of the United States and world spokesman of the nation, but Congress in its capacity as a coordinate branch of the government often resents what it regards as his interference.

Congress therefore operates in part under a plurality of leadership and in part without effective leadership of any kind. Important as leadership may be to securing enactment of statutes that must be enacted, the characteristic of being un-led is also a necessary ingredient to the performance of congressional functions. Congress exists not only to enact laws but also to deliberate over the question whether laws of particular kinds should be

enacted at all. When to the despair of interested groups and would-be leaders it bogs down in endless debate and gets entangled in its own machinery, this fact does not necessarily imply congressional malpractice. It may mean only that Congress, like the people generally, is of many minds about what should be done. It may mean that coercion to action by the party caucus or party leaders or the President would not represent legitimate action by Congress at all. Congress, to repeat, is the American people — not all the people, it is true, but the people assembled by proxy. It is expected not only to act for the people but to deliberate for them and to decide whether or not to act at all. Its obligation to deliberate for the people and to decide for the people can not legitimately be delegated to any other agent.

In preparation for transition from emphasis upon Congress to emphasis first upon the executive and then upon the judicial branch of the government, certain other factors need to be drawn out of the preceding chapters on Congress and linked with materials not hitherto presented. Particularly necessary is further discussion of the nature of statute law, of the changing content of statute law, and of the power of the executive particularly as it limits the scope of congressional action.

THE NATURE OF STATUTE LAW

Although part of the further discussion of the nature of law must be reserved for appraisal of the federal judiciary, it is important at this point to show more adequately the relation of statute law to law generally. New federal statutes, as already demonstrated, are but additions to and perhaps modifications of the existing body of statute law which is compiled in the *United States Code*. Except for the Constitution on the one hand on which all federal statutes are based, and on the other hand a body of administrative rules which derive largely from federal statutes, the body of federal statutes constitutes almost all the law there is in the federal government.[1] But in the study of law in the United States we must never forget that ours is a federal system in which only part of the powers of government are exercised in what we call the federal government and in which only part of the instruments of government and of law are utilized. In the formative years of the United States the mass of our law was not statutes, either state or federal, but the common law. The common law is still the basic law in many states, and our thinking about the nature of the common law conditions to some extent our thinking even about statute law.

The Relation of Statutes to Common Law. The English people, from whom we derived most of our beliefs about law, were greatly enamored of their body of common law. The common law was never enacted by any legislative body but was evolved in the courts. When a common law judge had to decide a controversy over ownership of a piece of property, for ex-

1. Federal treaties, of course, also have the status of law.

ample, he turned not to statutes for his answer but to the records of decisions in earlier cases. He tried to find a case identical with that now before him. Since few cases are exactly identical, he usually based his decision on the earlier case most closely resembling it. If he found two or more earlier cases resembling but not identical with his case and differing among themselves, he had to make a choice and to link his decision with the case of his choice. In selecting the case he chose to follow, the case which in the language of the law was called his "precedent," he tried to do that which was "right." Common law judges placed great emphasis on rightness. They believed that principles of rightness lay at the base of all common law decisions. The judge found out what was right, that is, he selected the right principle for the basis of his new decision, by use of the power of reason. He might occasionally reason incorrectly, but if he did so, other judges in later cases would reason more correctly and would link their decisions not with his but with others which were more nearly right. It was believed that by this process of deciding cases according to the principles of earlier cases, and appraising the earlier decisions as they did so, the judges had built up a body of common law which was the finest known product of the reasoning of mankind. It reflected sound reasoning and it was "right."

In the light of their reverence for the common law and for judges as the discoverers of law, it is not surprising that English and American people were long suspicious and resentful of legislation as a rival of common law.[2] Legislation was enacted not by judges who knew the content and the symmetry of the common law, but by allegedly inexpert people. Statutes broke up the pattern of the law as judges know it and created areas of uncertainty about what the law was. Most statutes were unknown quantities until the passage of enough time for courts to interpret them in all important aspects. Respect for the common law and dislike of legislation could not, however, hold back the growing tide of legislation. Life was changing too rapidly for the common law to keep up with the needs of the times merely through judicial interpretation. People in new lands with new conditions needed new laws, and they wanted them "now." In state legislatures as in Congress, the output of legislation has flowed in a steadily expanding stream. Opposition to legislation was dissipated so completely — except within the legal profession itself — that every new need gave rise to the notion that "there ought to be a law" — to the assumption that almost all problems could be solved by legislation.

Even over statutes, however, common law thinking has retained something of its hold. Although statutes are enacted by legislatures, a statute is seldom drafted so carefully that no dispute over its meaning can arise. The basic disputes over statutory meanings are settled in courts. The judges interpret statutes as they interpret common law principles — in terms of what their reason tells them is "right." Unless flagrant changes in the

2. It is true that because of its English origin the common law was in bad odor in some quarters of the United States for a number of years after the Revolutionary War.

meaning of the language of statutes are involved, and unless the judge seems to be distorting the concept of rightness, the people still approve judicial use of the concept of rightness as a basis for interpreting ambiguous provisions of statutes. The difficulty comes when the people differ with the judges as to what is "right" in a given situation. Some years ago, for example, liberal judges on the Supreme Court stirred the indignation of conservative people by their interpretation of a provision of the Fair Labor Standards Act of 1938 in the so-called "portal-to-portal" cases.[3] The Court held that ambiguous language in the statute required the employer to begin the payment of daily wages as of the time when the workman entered the "portal" of the mine or factory where he worked and to continue payment until the workman had made his exit from the portal. This requirement seemed "right" to the judges and to liberals and friends of labor generally, but it seemed wrong to employers and their friends who thought workers should be paid only for the time actually spent in working. The decisions remained in force until Congress, under conservative Republican leadership and more in sympathy with employers than with workers, changed the statute to eliminate the portal-to-portal rule.

In the enactment of statutes also, as distinguished from their later interpretation, beliefs in rightness play a part even if it is a lesser part than they play in interpretation of the common law. A member of Congress does not urge enactment of a bill merely on the ground that it is demanded by the American Federation of Labor or the American Farm Bureau Federation or the United States Chamber of Commerce. He urges it on the ground that it will be "good" for the country or for some important part of the country. It will meet a vital need, it will serve the public welfare. Like the common law judge, therefore, he is at least vocally attempting to make "rightness" the basis of law. If his real motive is something other than rightness, if his parroting on the subject of rightness is but the show of deference "which vice pays to virtue," he obviously believes that the people to whom he owes his election have a sufficient interest in rightness to make it advisable for him to talk in terms of it.

Once enacted, furthermore, statutes, like the decisions of common law courts, either survive or get themselves nullified or repealed depending on the continued approval of the people, depending on whether they are deemed to be good for society, to be "right." The enactment and administration of statutes is confused when the people differ sharply over what is right, over what is good for the community. Resort to national prohibition under the Eighteenth Amendment, "an experiment noble in purpose" as described by President Herbert Hoover, brought national confusion because people in some sections of the country highly approved of it while those in other sections vigorously disapproved of it. The statute was partly enforced in some places and hardly at all in others. Congress, belabored by

3. For the portal-to-portal cases, see *Tennessee Coal, Iron & Railroad Co.*, v. *Muscoda Local*, 321 U.S. 590 (1944); *Jewell Ridge Coal Corp.* v. *Local*, 325 U.S. 161 (1945); *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

both sides, failed to repeal the statute prior to repeal of the constitutional amendment itself, but it failed also to vote appropriations sufficient to provide for adequate enforcement. Rightness, or the popular interpretation of rightness, was divided, with the result that there was no adequate support for or administration of the law.

Statute Law and Social Pressures. It is of course true that beliefs about rightness do not alone determine what statutes will be enacted and what bills will be rejected. Organized pressure plays its part. Years of indignation about the discriminatory federal tax on colored oleomargarine, which had been levied under pressure from dairy interests, did not alone bring about elimination of the tax. It was not until the oleo interests built up a powerful lobby of their own that the tax was repealed. Yet not too much must be inferred from this fact. When the tax was first levied, many people were convinced — and it may have been true — that oleomargarine was inferior to butter and that if it were colored to look like butter it would be sold in such a way as to defraud purchasers. The dairy lobby may have distorted its case, but a case was not altogether wanting. Furthermore, the oleo lobby did not make itself effective merely by threatening to defeat anti-oleo legislators at the polls. The basis of its effectiveness was its demonstration to the people that oleo was now a product of high quality and that elimination of the tax would give the people an attractive and palatable food product at a price much lower than that of butter. In other words, part of its task was successful demonstration of the fact that elimination of the oleo tax was "right."

Pressures exerted by organized labor provide another illustration. Although they do not actually control the votes of the mass of union members, labor leaders have a great deal of influence over voting behavior. Some of them obviously enjoy wielding power. Their publication of the voting records of members of Congress on all measures affecting the interests of labor and their crusades to defeat particular candidates undoubtedly exercise influence on congressional voting which is not directly connected with matters of rightness. Yet in their propaganda campaigns no leaders can be more indignantly righteous than a labor spokesman as he denounces the capitalist "oppressors" of labor and the "iniquitous" legislation, such as the Taft-Hartley Act, allegedly enacted at their behest. No group is more genuinely earnest in its conviction that right is on its side than the workers of the country. The conviction of rightness gives power to its cause. Again, while pressures from business and from veterans and from other powerful groups are not directed by men who are primarily crusaders for righteousness, they must ordinarily use at least a cover of righteous argument in order to make themselves effective. The fact that such a cover must be used has important implications for explanation of the legislative process.

The Changing Content of Statute Law. Congress must operate amid pressures to make changes in the existing body of statute law and other

pressures for keeping the body of law just as it is. Vested interests are likely to be involved on both sides and arguments in terms of rightness are used on both sides. Labor leaders were being just as verbally moral, for example, when they were arguing against changing the National Labor Relations Act of 1935 as they were later when seeking repeal of the Taft-Hartley Act by which the former statute was replaced. But argument against change in law has a peculiar backing in sentiments of rightness. There is in our tradition an assumption that law is good because it is law, and that it ought not to be changed unless a good case can be made for its alteration. The concept of rightness, in other words, or the feeling of rightness, is weighted somewhat on the side of the status quo. Proposals for change meet arguments that they threaten change in the American system of free enterprise, or in the American federal system, or that they invade traditionally protected American liberties. It is assumed that that which is traditional is good partly because it is traditional — that tradition and rightness are closely linked — and that a good case must be made for change if it is to be justified at all.

Yet changing circumstances force upon us acceptance of changes in statute law. We develop new wants and look to legislation as a means of satisfying them. The discomfort created by conditions out of kilter starts a searching for statutory remedies. Most people, wedded to the status quo and preoccupied with their own immediate problems, hold back from support of legislative change until discomfort and the agitation of interested minorities break down their resistance. Enough support is eventually secured to bring about enactment of a statute, but even at that time a measure of lethargic or actively hostile opposition usually remains. Within that dissenting group, if the measure is an important one, are likely to be a few reactionaries who lament the passing of the old order and predict the downfall of modern civilization.

The pattern of legislative change in the United States has been shaped largely by our gradual transition from a regime of simple agriculture and petty trade to a highly complex economy of mass production industrialism wherein even agriculture has come to partake of the general character of mass production industry. These changes in our economy have been paralleled by similar changes in many other countries. One of the results has been to shrink the world from a conglomerate of separate communities and partly impenetrable reaches to a globe whose most distant inhabitable points can be reached in a matter of days if not of hours. Instead of living in isolation we now live exposed behind an expanse of the world's gigantic and far from bulletproof show window, earning our livelihood through a complicated series of interrelationships among ourselves and with other nations. Our body of statute law must be kept in adjustment with the conditions of our current living.

As discussed earlier in this volume, the basic task of government during the formative years of the United States was the preservation of order, the exercise of the powers of police. Much of that power could be exer-

cised by states and local communities. It was the improvement of transportation, the development of powerful business corporations, and the transformation of the economy into a complex network of interstate relationships that brought the federal government into the field as a powerful regulatory agency. It was the technically closer relations with other countries and our growing vulnerability to involvement in modern total warfare that made it necessary for the United States to assume the responsibilities of a first class power in the undisciplined and disorderly family of nations. Activities of other nations which in earlier years would have been regarded as none of our concern have now become matters of great concern because of the possibility of involvement of our interests and our safety. Internal matters which in earlier years would have been handled locally or not at all now have such implications for the whole country that the nation must give its attention. The authority of the United States has therefore been extended both outward and inward, with the consequent expansion of the total of federal legislation.

While there has been a gradual extension of police legislation in the conventional sense of the term, there has also been a change in the character of the greater proportion of the legislation enacted. Much of it has become broadly regulatory. Figuratively speaking it prescribes the duties of large numbers of traffic policemen, as distinguished from legislation which applies to those policemen whose duty it is to prevent crime and apprehend criminals. It is calculated to prevent the chaos of disorder which might well develop without it even in the absence of any persons with criminal intent. The traffic officer does not control traffic at a street crossing because drivers of vehicles are seeking to violate law or because they are lacking in intelligence. He does it to speed the flow of traffic. He restrains the movement now of one stream of traffic and now of another, not for the purpose of punishment or correction but to insure to all vehicles the opportunity to pass within a reasonable period of time. The older type of federal legislation is illustrated by measures which punish robbery of the mails and which forbid the shipment of harmful drugs and diseased food in interstate commerce. The newer type is illustrated by guarantees of the right of collective bargaining, the allocation of wave lengths for radio broadcasting, and the defining of shipping lanes for ocean traffic. To handle matters such as these is the purpose of the vast and complicated mechanism which is authorized by Congress and implemented and operated by the executive for the regulation of economic enterprise.

THE ADEQUACY OF CONGRESS

The Task of Reexamination. The changes in our economy and in our relations to the rest of the world, which have necessitated drastic changes in the character and quantity of federal legislation, have come about not all at once but gradually. Through it all Congress as a legislating institution has undergone no fundamental changes. Widespread concern about the

current adequacy of Congress has been apparent only in times of crisis such as those of war and depression. The immediate sequence of the depression of the 1930's and World War II, wherein Congress had to yield leadership to the President, did result in a considerable amount of congressional self-examination. The criticisms of many members of Congress, together with those of other officers of the government and outside commentators, are compiled in the Hearings of the Joint Committee on the Organization of Congress, which were held from March to June, 1945, and which culminated in enactment of the Legislative Reorganization Act of 1946.

In the instance of Congress, as of other institutions with which the critic is thoroughly familiar, it is a difficult task to criticize operations objectively. Details tend to obscure over-all structure and matters of principle. This fact was particularly evident in the testimony of members of Congress before the joint committee. They saw the need for eliminating duplication in the work of congressional committees, for providing more research assistance, and for making other specific changes. It was the director of the Bureau of the Budget, however, and not a member of Congress, who urged the joint committee to "consider broadly what the role of Congress should be in the government of the United States." This official, Harold E. Smith, developed his point as follows:

> We are familiar with the observation that this is a different sort of world from that which existed when the Constitutional Convention devised the framework of our government. Yet we still lack a penetrating and practical restatement of the role of representative assemblies in the light of the changed problems with which they deal and the altered conditions under which they operate. We are up against the fact that legislative bodies have not changed very much but the kinds of problems with which they must cope have changed radically. Your own talents and the keenest minds you can command could very well be devoted to rethinking the functions of the Congress under present conditions. A sound reformulation of the role of the representative body is basic to all the work of your committee. Only on such a basis can one develop standards by which to judge and develop proposals for changes in organization, procedure, staffing, and other matters.[4]

Members of Congress who testified at the hearings were deeply concerned about the shift of actual power from the elected representatives of the people to a host of agencies manned by non-elective personnel. It was not a member of Congress but a law school professor, Walton H. Hamilton, of Yale, who emphasized the fact that "For this breach between the democratic process and the operation of government no person, clique, interest, or section is to blame." He explained it as follows in terms of the broad sweep of events:

> It is a breach in the political order thrown up by the course of human events. It is now popular to think of it as a creation of the war or of the New Deal. The New Deal and the war have alike given impetus and given volume; they have exhibited a governmental establishment of such size and

4. *Organization of Congress,* Hearings before the Joint Committee on the Organization of Congress, 79th Cong., 1st sess., pp. 670–671.

> varied activities as to make us aware. But they have in fact done no more than accelerate trends long in the making. For the political order our fathers knew is undergoing profound change. The rule of the three-in-one — legislative, executive, judicial — was never as neat as we love to think. It still carries on formally as it used to do; but a new order, almost unknown to our political theory, has arisen in an area in which the Constitution has little directly to say. For the separation of the state and the economy, which stood us in good stead before the First World War, has been seriously compromised and in some domains of our national life is ending. As we have become urban and industrialized, *laissez-faire* has been increasingly unable to deliver the goods of opportunity, prosperity, and advancing standards of life. The felt necessities of the people have increasingly come to be of official concern. So the government has been called upon to prod, underwrite, complement, supplant individual endeavor. As a result a host of agencies, each charged with its own particular task, have sprung into being.[5]

During the half century just past, the change in legislative subject matter has worked a gradual change in the form of legislation. The new regulatory legislation can not be executed merely by exercise of the conventional powers of policemen and marshals. It calls for the exercise of something more than merely coercive power. The modern regulatory statute makes a broad grant of power either to an existing executive or administrative agency or to one which it creates. It declares purpose, prescribes procedure in broad outline, and confers administrative discretion on the administrative agency so that administration can be adjusted to rapidly changing events. It is only by limiting itself to broad outlines, with resort to details only at critical points, that Congress can enact enforceable legislation on the innumerable topics with which it must deal. Congressmen often complain about the time-consuming demands of constituents who require of them services of various kinds. Those demands undoubtedly do consume a great deal of time. The problem of the legislator would not be solved, however, even if he were relieved of all these burdensome duties. No human being has the time to equip himself as well as a member of Congress ought to be equipped for appraising existing and proposed legislation dealing with taxes, inflation, agriculture, industry, labor, foreign affairs, and so on.

The functions of the individual legislator, therefore, have greatly changed. There was a time when he could perform his legislative duties reasonably well by working for legislation beneficial to his constituency and opposing legislation detrimental to it. Today he must still concern himself about his constituency, but he has a far greater responsibility to act for the benefit of the country as a whole. True, not all legislators properly assume this responsibility, but to the extent of their failure to do so, Congress fails in the fulfillment of its responsibilities. It is this rising pressure of responsibility which necessitates more efficient operation of the committee system, more secretarial and research assistance, and other aids which conserve the time and add to the information of individual legislators. It is this rising pressure which makes it important that both Congress and the country

5. *Ibid.*, p. 700.

rethink the position of Congress in the aggregate of our political institutions.

The Statement of National Purpose. Congress has in the offing one potential function which it has never properly touched. If that body is the American people in congress assembled, and if it meets in Washington to make governmental policy for the people, it ought to do more than make isolated pieces of national policy by the enactment of separate statutes. It ought to have and to voice its conception of where the country is going, of what it is moving toward or from, in the total of the several steps taken. The establishment of party policy committees, particularly in the Senate, was supposed to provide for the working out of party strategy in one house, but it did not call for or at any rate did not require articulate statement of party policy. The attempt made by Republicans in 1950 to agree on party policy with congressional party members sharing in the formulation was a move, if but a short one, in the direction of defining broad party goals. But no attempt has ever been made by Congress as a whole to plot the work of a session in terms of an integrated program, and no Congress has ever attempted to justify its annual product in terms of a central goal.

It is sometimes said that Congress cannot be expected to pursue any goal clearer than some vague statement about promotion of the public welfare. It is said that because of the division of Congress into two parties and because of the vulnerability of the legislator to his constituents and to the interests which exert pressure upon him, he can do little more than respond to the total of pressure as it weighs upon him. If this is true it means that Congress is helpless except as it has a measure of free play with respect to measures for and against which pressures are approximately equal, and that the American people whom Congress represents are also helpless. It means that if there is to be any official statement of national purpose it must come from the President, who in terms of our tradition is elected to execute the laws and not to make them, rather than from Congress which according to the Constitution is the depository of "all legislative powers herein granted."

While it would obviously be easier to articulate unity through the voice of one man, the President, than through a bicameral legislative body, there is no absolute barrier to intent and careful forward-looking on the part of Congress. It may well be the tradition of piecemeal action rather than anything fundamentally difficult in the way of broad policy statement that stands in the way of the integrated planning of governmental policy by Congress. During the years ahead we shall use the power of government to do a great deal about the operation of industry, about agriculture, about labor, about our relations with other countries. What we do in one field will have important implications for what we do in another. If we make no attempt to integrate our activities we shall run the risk of contradicting and frustrating ourselves at every turn. In a regime of *laissez faire* it might be possible to keep right hands concealed from left ones and to muddle

through without completely defeating our purposes in the process of the muddling. With the implications of all our doings intertwined as they are today, it would seem that muddling — or merely blind response to immediate pressures — would have no high mark in the measurement of statesmanship or in the measurement of the adequacy of a legislative body.

CONGRESS AND THE EXECUTIVE

The Executive and the Enactment of Statutes. In spite of the breadth of the power conferred upon it by the Constitution, Congress never completely loses sight of the fact that, in the language of John Gaus, "the modern national state has grown through the evolution of public collective services," and that "the core of this development has everywhere centered in the executive." It senses at least vaguely the fact that in our western tradition the "invention of legislative and judicial institutions" has been stimulated by "the struggle for the control of executive institutions."[6] In other words, Congress with all its constitutional power sees itself partly in the tradition of a restraining rather than of a creating institution. It is continually sensing the possibility that the executive will get out of hand so that restraint cannot be properly exercised and so that Congress will be inhibited in the exercise of the powers conferred upon it by the Constitution. The Constitution links the President to Congress not only through the exercise of the veto power but through the direction that he shall "give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient." It gives him indirect coercive power through his partial control of appointments which may constitute part of the patronage upon which legislators depend to keep themselves in office. He is, in addition, the leader of his political party with a measure of control over the members of his party in Congress.

Congress has long been accustomed to the exercise of these powers and has not been greatly concerned about it except as an occasional veto gives rise to indignant outbursts. It has been concerned, however, about what it regards as executive encroachment of a somewhat different kind. The great mass of new-type legislation, that which deals with "the evolution of collective services" and which provides for detailed governmental regulation of enterprise, calls for intricate knowledge of subject matter on the part of legislators as well as of administrators. Each new regulatory statute has repercussions throughout the economy and relates in innumerable ways to other statutes already in force. The several statutes giving power to the Securities and Exchange Commission to regulate the marketing of securities in interstate commerce, for example, tie in with the other statutes regulating interstate commerce of all kinds, including those dealing with railroads, water transportation, air transportation, electrical communication, the

6. John Gaus, "The Presidency," *American Political Science Review,* vol. XLIII (October, 1949), p. 956.

mail service, the banking system, the currency, the operations of the federal courts, and so on. Few members of Congress are well enough equipped with knowledge of the possible ramifications of a new statute to be able to draft a statute that would achieve the purpose in mind without doing unexpected damage all along the line to the existing scheme of regulation. The only people equipped to plan the fitting of a new regulatory statute into the existing picture are experienced men employed in the executive branch of the government. Because they know more about the subject than anyone else, they may be asked to present rough drafts of bills or they may draft bills on their own initiative to indicate the kind of measures they believe Congress ought to enact. In government as in other fields it is likely to be the first formulation of an idea which determines its ultimate contours. If an idea has been developed in the executive branch of the government and worked into a draft of a bill, it is highly probable that the essentials of executive handiwork will remain if any measure is enacted at all, no matter how closely Congress may scrutinize the executive proposal. Yet in accepting legislation basically planned by the executive, Congress sees its creative functions passing into the hands of non-elective administrative officials.

Executive Control of Information. The executive branch of the government has a peculiar advantage with respect to information about government operations because it is itself the operating branch of the government. The executive and not Congress does the actual work of regulating commerce, promoting the welfare of agriculture, waging war, and so on. It is in position to know what is being done and to estimate what ought to be done. Congress realizes this fact and is constantly critical of administrators for their failure to keep Congress properly informed. Administrators often become peculiarly possessive of their jurisdictions and resent congressional inquiries into their activities. Furthermore, where secrecy is involved, as in matters of national defense and the conduct of foreign affairs generally, members of Congress are said to be notoriously unable to hold information in confidence. On the evening of December 7, 1941, for example, after the Japanese attack on Pearl Harbor, and after President Roosevelt had drafted a message to Congress for delivery the next day calling for a declaration of war, he answered questions from a delegation of congressional leaders by saying that he did not know whether he would ask for a declaration of war. Said Harry Hopkins,

> As a matter of fact the President, of course, knew that he was going to ask for a declaration of war but he also knew that if he stated it to the conference that it would be all over town in five minutes, because it is footless ever to ask a large group of Congressmen to keep a secret.[7]

Secrecy in military matters is of course peculiarly important. In connection with the development and production of atomic bombs Congress itself has realized the importance of keeping information from enemies or possible

7. Robert E. Sherwood, *Roosevelt and Hopkins: An Intimate History* (New York: Harper, 1948), p. 433.

enemies and has deliberately authorized and financed procedures which operate behind closed doors which are partly closed even to Congress. Yet on November 1, 1949, Senator Edwin C. Johnson, a member of the Joint Committee on Atomic Energy, is said to have disclosed to the world via a television show information that the United States was working on a super-bomb, which was thereafter commonly referred to as the hydrogen bomb. He was quoted as saying,

> Here's the thing that's top secret. Our scientists from the time that the bombs were detonated at Hiroshima and Nagasaki have been trying to make what is known as a super-bomb. . . . And we've made considerable progress in that direction.[8]

Inquiries based on these words and the remaining portion of the senator's statement led to release of further information about the hydrogen bomb. President Truman is said to have called in the Attorney General and Senator Brien McMahon, chairman of the Joint Committee on Atomic Energy, and demanded that security leaks in Congress be "plugged up."[9] Senator Johnson apparently defended himself on the ground that other people had already been guilty of utterances disclosing all that he had said. In actuality the FBI, and perhaps the Joint Committee on Atomic Energy, must at that time have known of the information, soon afterward disclosed, that Klaus Fuchs, a German-born British scientist, had systematically turned over to the Soviet Union information about our atomic weapons. It is possible, or even probable, therefore, that what Senator Johnson did was merely to give the American people information which our enemies in the cold war already possessed, that he had done no harm except in failing to "save face" for the executive agencies which had not succeeded in keeping information from the enemy.

There is, indeed, a kind of paternalism in the executive branch with respect to Congress and to the people which both Congress and the people resent. The people are to be protected, and incidentally controlled, by being told only what it is safe for them to hear. Members of Congress must be told just enough to secure right action but not enough to secure ill-considered action. In the language of a newspaper commentator, "If you tell them too little they go fishin', and if you tell them too much they go crazy."[10]

Executive Application of Statutes. One of the drawbacks to congressional acceptance of bills drafted in the executive branch is the fact that however close congressional scrutiny is, provisions may be accepted which, applying to matters which Congress does not fully understand, may enable administrators to take action which Congress would not intentionally authorize.

8. Arthur Krock, "How the Super-Bomb Project was Disclosed," *New York Times,* February 2, 1950.
9. *Ibid.*
10. James Reston, of the *New York Times,* as quoted by Marquis Childs, "Behind the Jitters," *Washington Post,* April 6, 1948.

In accepting such bills, therefore, Congress has something of the feeling of buying a pig in a poke. Furthermore, even if there is nothing literally wrong with bills enacted at the request of the executive, those bills, like most other regulatory measures enacted by Congress, must be drafted broadly to meet changing situations and must therefore give a considerable amount of leeway for the exercise of judgment by administrators. Congress, therefore, discovers from time to time that measures are being enforced in ways it never dreamed of. In enactment of the Fair Labor Standards Act of 1938, for example, it seems never to have occurred to Congress generally that the bill authorized a federal administrator to require employers to pay wages from "portal-to-portal," as discussed above. In many other instances Congress has the irritating if undocumented conviction that its enactments are being used for purposes which it would not willingly sanction. Such was in part its reason for establishing a "watch-dog committee" to keep constant check on administration of financial aid to Europe under the Marshall Plan. Congress has a sense of continuing responsibility for the operation of its statutes, whereas the executive branch feels that the congressional function has been completed when statutes are enacted and that administration and law enforcement belong exclusively to the executive. Congress feels that it ought to supervise the agencies carrying out the functions which it has prescribed, while the executive feels that these matters call only for executive supervision. The executive is perennially attempting to divorce administration from congressional control, and Congress, through investigations, control over appropriations, and other methods, attempts to keep its hands on the execution of its laws.

Official Investigations. The executive branch has always submitted as a matter of course to a considerable amount of congressional investigation of its activities. Executive agencies keep their records with an eye to the fact that they may at any time be hauled off for examination by a congressional committee. Such investigations are resented, even though in order to secure appropriations and other desired legislation it may be necessary to submit with an appearance of good grace. There is somewhere a point, however, beyond which congressional investigations of the executive cannot go. It is generally understood that the President himself cannot be compelled to disclose information of any kind. It is widely assumed that presidential agents may not be compelled to disclose information confidentially collected for the use of the President in the performance of his duties.

This immunity from congressional investigation has been asserted in a series of situations culminating in an official opinion of the Attorney General that findings of the FBI are not to be disclosed on request of a congressional committee. In April, 1941, the chairman of the House Committee on Naval Affairs wrote to the Attorney General asking for the results of investigations made by the Department of Justice "arising out of strikes, subversive activities in connection with labor disputes, or labor disturbances of any kind in industrial establishments which have naval contracts, either

as prime contractors or as subcontractors." Attorney General Jackson declined to give the desired information. He said in part:

> All investigative reports are confidential documents of the executive department of the government, to aid in the duty laid upon the President by the Constitution to "take care that the laws be faithfully executed," and . . . congressional or public access to them would not be in the public interest.
>
> Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the government has, and what witnesses or sources of information it can rely upon. That is exactly what these reports are intended to contain.[11]

The Attorney General argued that disclosure of the reports at that time might also prejudice the national defense and be of serious prejudice to the future usefulness of the Federal Bureau of Investigation. Furthermore,

> Disclosure of information contained in the reports might also be the grossest kind of injustice to innocent individuals. Investigative reports include leads and suspicions, and sometimes even the statements of malicious or misinformed people. Even though later and more complete reports exonerate the individuals, the use of particular or selected reports might constitute the grossest injustice, and we all know that a correction never catches up with an accusation.[12]

When the executive refuses to give desired information there is little that Congress can do about it. It is regarded as futile to appeal to the courts, since the courts have held that the executive has the right to determine whether it is in the public interest to disclose information. In the circumstances of this case Congress could have punished the Federal Bureau of Investigation by withholding funds or by otherwise curtailing its powers. To do so, however, would have deprived the country of its services at a critical time and would also have offended those voters to whom the FBI is a romantic as well as a highly meritorious institution.

The same question arose again in 1948 in connection with the loyalty program of the federal government, a program whereby government personnel were carefully scrutinized for their loyalty to the United States. The House Committee on Un-American Activities challenged the loyalty of Dr. Edward U. Condon, head of the Bureau of Standards in the Department of Commerce, who had duties connected with the development of atomic energy. The Secretary of Commerce refused to obey a House subpoena calling for a letter from the Federal Bureau of Investigation about Dr. Condon. To clarify executive policy in such matters President Truman issued a directive declaring that the efficient and just administration of the employee loyalty program required that all records be preserved in strict confidence. He therefore ordered that

> Any subpoena or demand or request for information, reports, or files of the nature described, received from sources other than those persons in the

11. Opinion of the Attorney General of the United States, April 30, 1941, p. 2.
12. *Ibid.*, pp. 2–3.

> executive branch of the government who are entitled thereto by reason of their official duties, shall be respectfully declined, on the basis of this directive, and the subpoena or demand or other request shall be referred to the Office of the President for such response as the President may determine to be in the public interest in the particular case. There shall be no relaxation of the provisions of this directive except with my express authority.[13]

The issue became one between a Republican Congress and a Democratic President in an election year. The House of Representatives responded to presidential defiance by passing, 301 to 29, a resolution peremptorily directing the Secretary of Commerce to "transmit forthwith to the House of Representatives" the full text of the letter in question which had been sent by the director of the Federal Bureau of Investigation to the Secretary of Commerce.[14] President Truman's comment at a press conference held immediately thereafter was in substance that his political antagonists in Congress could "try and get it." He was reminded of a Supreme Court decision which had antagonized President Andrew Jackson and about which Old Hickory was reported to have remarked, "The Chief Justice has made his decision; now let him enforce it."[15]

Serious as are these points of conflict between Congress and the executive, however, they should not be overemphasized. Congress does not always resent executive aid in the planning of legislation. Administrators willingly give a great deal of valuable and at times confidential information to legislators. Members of Congress do not publicly disclose all secrets that are shared with them. In connection with an enormous amount of business, indeed, the legislative and executive branches of the government work together with as much harmony as can be expected in such a situation, people being what they are. There is, however, a great deal of friction of the kind indicated, and its reduction is a matter of very great importance.

ALLEVIATING CONGRESSIONAL–EXECUTIVE CONFLICT

Although it is generally recognized that a certain amount of disagreement and conflict is inherent in the operation of any set of institutions and that it may indeed have its values, thoughtful people have in recent years been concerned about the defects in our machinery for swift adjustment to a national crisis. We were able to cope with the problems of the depression through congressional delegation of sweeping emergency powers to an unusually able and popular President who had adequate capacity for self-restraint in the exercise of those powers. We met the problems of World

13. Directive of March 13, 1948, 13 *Federal Register* 1359, March 16, 1948. For the President's explanation of his reasons for issuing the directive see the *New York Times*, March 16, 1948.

14. *Congressional Record*, April 22, 1948, vol. 94, part 4, pp. 4777–86.

15. *New York Times*, April 23, 1948. See also President Truman's letter to Senator Millard E. Tydings, April 3, 1950, in the *New York Times*, April 4, 1950. In May, 1950, in effort to cope with irresponsible "shot-gun" accusations made by a senator against employees of the Department of State, President Truman ordered certain loyalty files opened to a Senate committee. See *New York Times*, May 5, 1950.

War I and World War II in much the same way. The precedents, however, are not altogether comforting. Fate may not always equip us with a Woodrow Wilson or a Franklin D. Roosevelt at times of need for strong and trusted leadership. There may not always be time for public opinion to take shape in support of the President and to coerce Congress into giving him legislative support. Furthermore, in view of the rapidity with which one emergency succeeds another and the time spent in coping with emergencies, it may be doubted whether we can afford to have Congress take a back seat and defer to the President at all times during which crisis action is needed.

Critics of present relations between the two branches of the government vary tremendously in points of view and interests. Some of them, fearing the building up of independent executive power, excessive coercion of business, and excessive government spending, would like to subject the executive to more effective legislative restraints. Others would more fully subordinate Congress to the executive so that the latter could govern largely without legislative restraint. Others would create mechanisms intended to bring Congress and the executive together at the top of the governmental structure in the hope of using the dynamics of both. Most discussions of sweeping changes include proposals for establishing in some form a cabinet system having varying degrees of resemblance to the system used in England.[16]

A Cabinet System. The essence of a cabinet system of government as it prevails in England, and as it differs from the presidential system of the United States, is that the cabinet is formed from among the leaders of the majority party in the legislature and exercises governing power until the legislature demonstrates that it no longer has confidence in the cabinet, whereupon the cabinet must resign or call for election of a new legislature. In a sense, therefore, the legislature and the executive are one body. The executive consists of the legislative leaders, who can continue to exercise executive power only as long as they retain the confidence of their fellow legislators. In theory and to some extent in practice, the legislature makes policy, working it out and putting it into practice through its leaders, who best know how to make it effective because they are engaged in the task of administering as well as of making policy. If the machinery of the cabinet system does not always produce the coveted harmony between legislative and executive agencies, it at least does not deliberately pose the two branches of the government as rivals and invite disagreement between them as our system of separated powers seems to do.

From the time of the early writings of Woodrow Wilson[17] until the present day, respectable thinkers in the United States have praised the

16. For some of the various proposals see Henry Hazlitt, *A New Constitution Now* (New York: McGraw-Hill, 1942), W. Y. Elliott, *The Need for Constitutional Reform* (New York: McGraw-Hill, 1935), and Thomas K. Finletter, *Can Representative Government Do the Job?* (1945).

17. See Woodrow Wilson, *Congressional Government* (Boston: Houghton Mifflin, 1885).

cabinet system in contrast with our presidential system and have advocated changes in the presidential system going part or all the way toward its British counterpart. Under such a system the United States would be governed by a cabinet chosen from the majority party in Congress. The cabinet would be headed by a prime minister or a president. By adopting a resolution of no confidence in the cabinet, Congress could bring about resignation of the cabinet at any time, unless the cabinet believed its program more in harmony with the desires of the country than the position of its critics in Congress, in which case it might dissolve Congress and hold a new congressional election. Thus, while congressional terms would have a maximum length — it is five years in the British House of Commons — they would have no minimum length. The cabinet could get rid of a Congress which failed to keep up with the times and bring about the election of a successor. In similar fashion, Congress could get rid of an executive which failed to keep in adequate touch with the needs and desires of the people.

Limitations of the Cabinet System. If the cabinet system has the merits indicated and the support of reputable thinkers, it also has its serious limitations as far as possible application to the United States is concerned, and it has its severe critics. Don K. Price, for example, an authority in the field of public administration, has remarked that "Perhaps only a psychoanalyst could explain America's peculiar nostalgia for the obsolescent institutions of the mother country."[18] He notes that whereas much of the sentiment for the parliamentary system in the United States springs from a dislike of executive influence over legislative proceedings, executive influence over legislation is much more clearly dominant in Great Britain than in the United States. He notes that "in Great Britain 'must' legislation is always enacted and very few other statutes are, while the 'purges' of party members who refuse to follow their leaders are almost always successful."[19] Only in theory today, as distinguished from half a century ago, can the house dismiss the cabinet. The majority party organization in the House of Commons, which is headed by the prime minister, maintains control over party members which is more than sufficient to protect the cabinet.

Once it is chosen, therefore, the cabinet becomes not only the executive but in large part the legislature as well. The several hundred members of the House of Commons who are not given executive responsibilities are in position to criticize within limits and to call for explanations of executive conduct, but majority party members can desert the cabinet in voting on critical issues only at their peril. The cabinet controls almost completely the formulation of legislation. Although important bills are debated in large and unspecialized committees, they are not subjected to criticism and overhauling by committees having a considerable amount of expert-

18. Don K. Price, "The Parliamentary and Presidential Systems," *Public Administration Review,* vol. III (Autumn, 1943), p. 317.
19. *Ibid.,* p. 318.

ness as, for example, when a tax bill worked out by the United States Treasury Department is submitted to the House Committee on Ways and Means. The British system, developed for a small country with a relatively homogeneous population, provides no adequate means for injecting into legislation the sentiments of diverse areas with highly diverse needs. The executive works out legislation for the nation as a whole in terms of its own conceptions of national needs, and that legislation is enacted largely in the form in which the cabinet presents it for consideration.

Some discussion of the merits of the British cabinet system took place before the Joint Committee on the Organization of Congress when that committee was making plans for the Legislative Reorganization Act of 1946. Walton Hamilton, of the Yale Law School, remarked that he was a little perturbed at the current flow of literature in books, articles, and editorials, advocating American adoption of the English system. Our situation and our needs, he thought, had not been correctly analyzed.

> The clash of executive and the Congress is greatly overdone; it presents no more than a minor problem. The character of the English system is missed; the distinctive conditions of American society, which it would never fit, are overlooked; the activities which make up our pattern of government are not adequately taken into account. The life of any political system is function; imitation, especially where situations are unlike, can never spell function.[20]

In Great Britain, Hamilton argued, parliamentary government was not a mechanism. It was a group of usages through which the constitution operated and the English people carried on.

> A small and compact nation, a clean-cut social structure, a high regard for the proprieties, a general agreement on articles of faith, a zone of action narrow enough to blunt the edge of difference — such are the conditions of its success. But the conditions which make for success there do not exist here. Our population is made up of many elements; we have no class structure, no nucleus of first families; no common body of opinion which confines differences to non-essentials; no tendency for all members of Congress to think as one in the face of a crisis. There is no neat, well-ordered society here, such as England possesses, to which this system of cabinet government can be fitted.[21]

This conviction that the British cabinet system would not meet American needs is widely held and is likely to prevent adoption of any such system in the United States.

The Question Hour. Another British device often advocated for adoption in the United States either along with or independently of a cabinet system, is known as the question hour mentioned earlier. This is a device used by the House of Commons at the beginning of each daily session. Several days in advance of a particular session selected members of the cabinet are presented with questions which they will be called upon to answer. Their staffs prepare written answers to the written questions, and also

20. *Organization of Congress*, (cited above, note 4), pp. 702–03.
21. *Ibid.*, p. 703.

attempt to equip the cabinet member with information and advice on how to answer the single unwritten supplementary question which the questioner may phrase and ask after the written question has been answered. The question hour represents an exciting battle of wits. It undoubtedly has some effect in keeping the cabinet alert to matters under its jurisdiction; it equips rank and file members of Parliament with information about the government which they might otherwise have difficulty in getting; and it gives publicity both to the information and to the issues which the questions involve.

Some political scientists and scattered members of Congress over several decades, prominently including Estes Kefauver, formerly a representative and now a senator from Tennessee, have argued for use of the question hour in the United States as a device for getting information from heads of departments and for giving publicity to important issues.[22] As it operates in the House of Commons, however, the device does not permit the unrestricted and detailed questioning which is often necessary to bring out significant facts. If for no other reason than that both the House of Commons and the United States Congress have innumerable other time-consuming tasks to perform, it would not be possible to take the time of a legislative house for detailed questioning of all cabinet officers on all important issues. As Walton Hamilton noted in the testimony discussed above, "we have a device here which is vastly superior to that, and that is the appearance of the administrative officer before the congressional committee where the matter is a great deal more informal and the questioning is a great deal more searching than it could ever be before the House."[23] Even in the presence of congressional committees with a limited amount of specialized knowledge, as indicated earlier in the discussion of congressional committees, the administrator by virtue of his specialized knowledge is often able to answer questions indefinitely without fully revealing the information sought by members of Congress. Limited questioning before a full house, as distinguished from detailed questioning before a congressional committee, would in most instances bring even less satisfactory results.

Other Proposals. The limitations of particular recommendations, and the futility of attempting to pattern American government after the government of Great Britain, cannot be accepted as evidence that nothing should be done to improve legislative-executive relations in the United States. Many of the proposals may well have something to offer if they are properly adapted to the peculiar conditions of government in the United States. An often repeated suggestion is that candidates for membership in Congress be permitted to run for election in any constituency which they might choose, or in which they might be chosen, without regard to their residence. If the grip of local politics on elections could be weakened in this fashion,

22. See Estes Kefauver and Jack Levin, *A Twentieth Century Congress* (New York: Duell, Sloan & Pearce, 1947), Chapter 6.
23. *Organization of Congress,* (cited above, note 4), p. 705.

the person elected would regard himself as more of a national legislator and less of a local representative than is now the case. Fundamental changes in the operations of local politics must take place, however, before the people who groom candidates for office can be persuaded to accept any such change. Initial changes, indeed, are much more likely to come at the top, that is, between Congress and the executive in Washington, than in the area of election.

While the Joint Committee on the Organization of Congress was considering the problem, Thomas K. Finletter published a book in which he advocated establishment of a joint executive-legislative cabinet composed of nine congressional leaders and nine executive cabinet officers to meet regularly with the President and in the course of events to "take to itself the origination of the major policies of the government."[24] He thought that with use the new cabinet would grow in power. The new cabinet would be created by resort merely to a joint resolution of the two houses of Congress and an executive order of the President. As it achieved power and prestige, he looked to constitutional amendments to synchronize the terms of the President and members of Congress and to give the power to dissolve Congress if it refused to follow its leaders in the joint cabinet.

Such proposals, however, were too drastic for serious consideration by the Joint Committee on the Organization of Congress. As discussed above, the committee did recommend establishment of party policy committees in Congress. It recommended further that the majority policy committees of the two houses serve as a formal council to meet regularly with the executive "to facilitate the formulation and carrying out of national policy, and to improve relationships between the executive and legislative branches of the government."[25] The purpose of the device was "to narrow the widening gap between the executive and the legislative branches." The refusal of Speaker Rayburn and others to permit the bill to come to the floor of the House without prior elimination of this and other provisions demonstrated the unwillingness of professional politicians in Congress to accept even this minor shift in the exercise of power.

The problem of legislative-executive relations is a continuing one, and the discussion permits of no adequate summary. The problem is in part a matter of machinery, but it is a matter also of something else — of intent and spirit and imaginative capacity for making the best of each situation in which governmental machinery is to be used. When the President lacks friendliness and diplomacy, and when Congress is dominated by obstructionists who are concerned primarily with making capital out of antagonism to the President, relations are bound to be bad. Relations are bound to be bad when prominent leaders in Congress, drunk with the sight of power, sabotage every program which reflects presidential rather than congressional leadership. They are bound to be bad when non-elective members of the executive branch become intoxicated with their own alleged superiority

24. Finletter, *op. cit.*, p. 98.
25. *Organization of the Congress,* Senate Report No. 1011, 79th Cong. 2d sess., p. 13.

over members of Congress, and conspire to govern without reference to congressional conceptions of policy and congressional supervision. Our system of government assumes — as must any representative system — a measure of willingness on the part of all officials to defer to, or make compromises in terms of, the judgments of other people in positions of responsibility. The system is calculated in part, but only in part, to shelter the people from the bad effects of official autointoxication. Unless something in the way of self-control and high statesmanship on the part of officials can be assumed, any representative system will break down. Ours has had its difficulties both because of the quality of personnel and the complicated character of its problems, but on the whole it has probably done reasonably well. The major question now to be answered is whether it has the continuing capacity to adjust itself to major changes in the responsibilities which modern government must assume. Whatever the tasks to be performed, the legislative and executive branches must continue to work together and to some extent within the confines set by the judiciary. They must work together, yet neither must be required to accept complete subordination to the other. The effectiveness of their collaboration will depend in part on the adequacy of the machinery set up for that purpose, but it will depend even more upon the vision and the self-control and the good will of the men by whom the two branches are staffed.

References

The Reorganization of Congress (American Political Science Association, Committee on Congress, 1945).

Wilfred E. Binkley, *President and Congress* (Knopf, 1947).

Lawrence H. Chamberlain, *The President, Congress and Legislation* (Columbia University Press, 1946).

Jonathan Daniels, *Frontier on the Potomac* (Macmillan, 1946).

William Y. Elliott, *The Need for Constitutional Reform* (McGraw-Hill, 1935).

Thomas K. Finletter, *Can Representative Government Do the Job?* (Reynal Hitchcock, 1945).

George B. Galloway, *Congress at the Crossroads* (Crowell, 1946).

Henry Hazlitt, *A New Constitution Now* (McGraw-Hill, 1942).

Alexander F. Hehmeyer, *Time for Change* (Farrar & Rinehart, 1943).

E. Pendleton Herring, *Presidential Leadership; The Political Relations of Congress and the Chief Executive* (Farrar & Rinehart, 1940).

Arthur N. Holcombe, *Our More Perfect Union* (Harvard University Press, 1950).

Joint Committee on the Organization of Congress, *Organization of the Congress*, Senate Report No. 1011, 79th Cong., 2d Sess., 1946.

Estes Kefauver and Jack Levin, *A Twentieth Century Congress* (Duell, Sloan & Pearce, 1947).

Robert E. Sherwood, *Roosevelt and Hopkins: an Intimate History* (Harpers, 1948).

H. Hubert Wilson, *Congress: Business as Usual* (Rinehart, 1950).

Woodrow Wilson, *Congressional Government* (Houghton Mifflin, 1885).

PART THREE ★ *The Executive*

15

The Presidency

The shift of attention from Congress to the presidency marks a shift from the making of laws to the enforcement of laws. Congress takes for granted most of the body of existing laws and concerns itself with decisions to make or not to make new laws. The President, or the executive branch of the government which he heads, enforces the whole body of existing laws, whether old or new. Congress deliberates upon possible changes in law. The President obeys the command of the Constitution that he "take care that the laws be faithfully executed." This division between deliberation and execution is of course not as sharp as the transition from Article I to Article II of the Constitution would make it appear. The President has a great deal to say about the making of law, and Congress says a great deal about how law is carried into action. The tendency toward division is real, however, and is reflected in the fact that Congress requires the aid of only a few hundred people at most for performance of its deliberative functions, whereas the President requires more than two million civilian employees to execute the body of laws now in force.

This process of execution, or administration, as it comes to be called below the level of major action, is harder to identify and describe than is the activity of legislation. The visitor to Washington can sit in the gallery of the Senate or the House of Representatives or attend the hearings of a congressional committee and see and hear and understand many of the processes of legislation. He can not as simply find execution or administration. He can see the administration buildings along or adjacent to Pennsylvania Avenue, or lose himself in the corridors of the Defense Department's Pentagon Building across the Potomac, but office buildings alone do not tell the story. He can find hundreds of people working in offices, but beyond their use of typewriters, telephones, and other apparatus he may get little idea of what they are doing. If he is important as a person or if he has influential connections or if his business is extremely important, he may possibly be able to get a brief interview with the President, but even this experience will tell him little about the manifold activities of the executive branch. To portray these activities in a book it is necessary to present them from a variety of angles. Since they are personalized by the President the study may well begin with the presidential office.

THE PRESIDENTIAL OFFICE

The Constitutional Base. Article II of the Constitution begins with the statement that "The executive power shall be vested in a President of the United States of America." It provided for election of the President and Vice President, as discussed earlier herein. It prescribed his qualifications — that he should be a natural born citizen, at least thirty-five years of age and at least fourteen years a resident within the United States. It provided for the succession in the event that he had to be replaced, and for his compensation, and prescribed the oath of office. It declared that he should be commander-in-chief of the army and navy and conferred upon him various specified powers, including those of making treaties, appointing officers, and granting pardons. He was directed to "take care that the laws be faithfully executed."

Apart from these specific enumerations, the Constitution throws little light on the scope of presidential power. Although the Constitution provides that the executive power shall be vested in a President, it does not define executive power. It does not tell whether a vast reservoir of authority is thereby conferred on the President, or whether it merely establishes the presidential office upon which executive powers may be conferred by acts of Congress. These questions are still being debated between the advocates of broad and narrow construction of the presidential powers.[1]

The Setting in Experience. The Constitution was vague about the character and scope of executive power not because of poor draftmanship but because of uncertainty in the thinking of the framers and their inability to reach agreement. Their firsthand information about executive power at the top level was limited largely to the British King and to the governors of the several states. As a result of their experience with King George III and the colonial governors whom he had appointed, the American people had drastically restricted the powers of governors in their adoption of state constitutions. In providing for government of the Union, the Articles of Confederation had conferred powers upon a Congress without differentiating between legislative and executive powers. That Congress found it necessary to set up its own executive machinery, consisting largely of committees of its own membership and other separate agencies responsible directly to Congress, but it made no attempt to unite and centralize control of its executive machinery. The Constitution was adopted to provide a government which had broader powers than those provided by the Articles of Confederation and which would operate with greater efficiency. To that end the framers saw the necessity of establishing a well-defined executive. Yet many of them, with earlier experience still in mind, feared that to establish a strong executive would be to extend an invitation to tyranny. Hence there were long debates on the methods of selecting the principal

1. For discussion of the controversy see particularly Edward S. Corwin, *The President: Office and Powers* (New York: New York University Press, 1940), Chapter I.

executive officer and on the nature and scope of executive power to be conferred.

The fears of tyranny expressed by some members of the Constitutional Convention were felt and voiced in exaggerated fashion by critics on the outside. In Article LXVII of *The Federalist,* in which he defended the provision for the presidency, Alexander Hamilton included the following paragraph:

> Here the writers against the Constitution seem to have taken the pains to signalize their talent of misrepresentation. Calculating upon the aversion of the people to monarchy, they have endeavored to enlist all their jealousies and apprehensions in opposition to the intended President of the United States; not merely as the embryo, but as the full-grown progeny, of that detested parent. To establish the pretended affinity, they have not scrupled to draw resources even from the regions of fiction. The authorities of a magistrate, in few instances greater, in some instances less, than those of a governor of New York, have been magnified into more than royal prerogatives. He has been decorated with the attributes superior in dignity and splendor to those of a king of Great Britain. He has been shown to us with the diadem sparkling on his brow and the imperial purple flowing in his train. He has been seated on a throne surrounded with minions and mistresses, giving audience to the envoys of foreign potentates, in all the supercilious pomp and majesty. The images of Asiatic despotism and voluptuousness have scarcely been wanting to crown the exaggerated scene. We have been taught to tremble at the terrific visages of murdering janizaries, and to blush at the unveiled mysteries of a future seraglio.

Hamilton scoffed at these fears and rejected the idea "that a vigorous executive is inconsistent with the genius of Republican government."[2] He attempted to show that the Constitution gave adequate power and at the same time provided sufficient checks on that power to prevent its abuse.

The Presidency Takes Shape. As far as the scope of constitutional authorization was concerned, it would have been possible to give presidential power a dangerous expansion or so to restrict it as to leave the office largely ineffective. In actuality, the office took shape largely in terms of the behavior of George Washington, its first occupant.[3] Washington was a man of great dignity and almost ponderous rectitude. Seemingly as a characteristic of his own personality he insisted on the deference due to a chief of state, yet he asked no favors for himself or his office and he recognized the jurisdictional rights of the other branches of the government. As a token of his attitude toward public service, he took a step not followed by his successors in rejecting all personal compensation and accepting only such payments as were necessary for the reimbursement of expenses. In spite of a suggestion from Alexander Hamilton that he ought to consider "whether there ought not to be some executive impulse," Washington limited himself to the mere suggestion of subjects for consideration by

2. *The Federalist*, no. LXX.
3. See Leonard D. White, *The Federalists* (New York: Macmillan, 1948), and James Hart, *The American Presidency in Action* (New York: Macmillan, 1948).

Congress [4] and did not attempt to use the power or the prestige of the presidential office to determine the course of congressional action. On the other hand, he resisted congressional encroachments on his own prerogatives. When the House of Representatives asked him for information about the details of making a treaty with Great Britain, he bluntly rejected the request saying that "A just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbid a compliance with your request." [5]

After eight years of occupancy, Washington left the pattern of the presidential office well established. The pattern has remained fundamentally the same, but has been modified from time to time with changing conditions and changing personnel. Some Presidents have had a greater desire for power than others, or greater skill in obtaining it, or better opportunities for its enhancement. Some periods, such as those of war or depression or other rapid change, have been more conducive to the exercise of strong executive power than others. There have been times when the people were frightened by the sweeping exercise of such power, and have expressed forebodings of presidential dictatorship. Strong Presidents tend to give way eventually to weaker ones, however, and some kind of balance among the three branches of the government has been maintained.

THE PRESIDENT AS A LEADER

National Leadership. The outstanding characteristic of the presidency is the position of leadership which the President occupies. He is the spokesman of a populous and powerful nation. He stands at the head of a political party which has been able to capture a majority of the electoral votes. He is director of a vast executive and administrative establishment. As a national leader the President personalizes the nation. He stands as a vital symbol of our national unity. Other national symbols exist in terms of the City of Washington, the White House, and the Capitol Building. Congress and the Supreme Court have like symbolic value. With greater clarity, vitality, and unity than any of these, however, the President stands out. It is first of all in him that the people find satisfied their yearning for personal symbolization and personal leadership. Even if his individual qualities suggest mediocrity rather than greatness, his position as President creates an aura of greatness around him. In this respect the office has a residue of sentiment carried over from monarchy, carried over, indeed, from chieftainship of almost every kind. George Washington, as a consequence of both military and political leadership, was characterized as "the Father of his country." American Indians often referred to the President as "the Great White Father." Some Presidents have embodied well the symbol of fatherhood. While it is hard to think of the crabbed visage of Calvin

4. White, *op. cit.*, pp. 54–5.
5. Quoted and discussed, Carl B. Swisher, *American Constitutional Development* (Boston: Houghton Mifflin, 1943). pp. 81–3.

Coolidge, or the dapper but diminutive figure of Harry Truman, in terms of the majestic symbol of national paternity, something of the father and child relationship creeps into the sentiments of most people with respect to whatever man happens to occupy the presidential office.

It is because of this element of symbolization, and not merely because of his personality or the power inherent in his office, that the presence and participation of the President is in demand at innumerable ceremonial functions. Because he speaks for the nation, for the people one and indivisible, his attendance is sought at meetings ranging all the way from international conferences to baseball games. Audience with him is sought by every conceivable sort of deputation. His words, whether well or poorly delivered, normally win attention over those of all other notables. He can get access to national radio chains at almost any hour of the day, and a vast listening audience. It matters little that he, in a given instance, may be Harry Truman, a one-time Pendergast politician from Missouri with a poor radio technique, for he is also President of the United States.

To people abroad even more than to those at home, the nation and the President are one. It is by him that ambassadors are sent and received. It is he who speaks in the name of the American people. Foreigners usually do not comprehend the mass of the machinery of our government, but they comprehend — or believe that they do — the office of President. The speeches and pronouncements of other officials may create for them an incomprehensible babel, but when the President speaks they listen to his voice as the voice of the nation. This fact becomes increasingly important for the United States as the handling of foreign relations plays an ever greater part among the activities of the federal government.

The President commands attention also because he wields power which can mold the conditions of our lives. The linkage of his power to command with the power which accrues to him as the symbol of national unity makes him the outstanding leader of the world, with the possible exception of the leader of the Soviet Union. A dynamic and persuasive President can at times not only exercise the powers already conferred upon him by the Constitution and the federal statutes, but can bring about addition to his powers by appealing over the heads of Congress to the people to coerce enactment of additional legislation. Franklin D. Roosevelt exercised such power in a high degree, and others, including Andrew Jackson, Theodore Roosevelt, and Woodrow Wilson, have also exercised it. To some extent a popular President can even impose his will upon the Supreme Court, although here he must move cautiously and avoid the appearance of a direct attack upon another of our important national symbols.

Party Leadership. It comes about almost as a matter of course that the man who is President is considered the leader of his political party. The presidency is the highest office within the grasp of a party. In its distribution of patronage and in its control of administration, it has the power to please or displease voters and the contributors of party funds, and therefore

in large part to determine the fate of the party at ensuing elections. Since party responsibilities extend to the election of members of Congress as well as of Presidents and Vice Presidents, presidential leadership of the party means to some extent leadership of party groups in Congress, in spite of the constitutional principle of the separation of legislative and executive powers. The extent of such influence varies from time to time. If the President's party happens to be the minority party in Congress or in one House of Congress, his leadership there will be at best only minority leadership. His effectiveness will depend in part on his popularity with the people, with the top politicians of his party, and with members of Congress. It will depend in part on his probable ability to force his renomination and reelection. A Tyler, or a Buchanan, or a Johnson can find himself virtually without a party, and with no prospects of reelection. If that happens, his power over Congress will be approximately zero. A Jackson, however, can virtually build a party in his own name — the party which elected Andrew Jackson was for a time known as the Jackson party — and can manage the party in such a way as to insure his continued leadership. A Franklin D. Roosevelt can pull a discouraged party out of the limbo of defeat and make it the instrument of tremendous power. He can so outshine lesser party leaders as to bring about his own renomination term after term in the face of the long-observed tradition that no President shall serve more than two terms. However much resentment he may stir among party leaders and members of Congress, his popularity, his perhaps ruthless daring, and his good-natured reminder that he is a "tough guy," tend to keep legislators and politicians subject to his will.

Administrative Leadership. The presidency involves over-all responsibility for the work of the entire executive and administrative establishment. Above the level of government employees classified under the merit system, the office involves the hiring, and if necessary the removal, of a vast assemblage of government workers. Although in large part it is Congress rather than the President which sets up the machinery of government, decides broad matters of policy, and makes appropriations for their execution, it is in large part the President who sets the tone of administrative operations and decides where vigor shall be displayed or where the machinery of government shall be permitted to slow down for lack of leadership and momentum. If he has a measure of influence with Congress, the President can curtail the activities and contract the jurisdiction of some agencies and arrange for comparable expansion elsewhere. During the New Deal period, for example, the Department of Commerce, the favorite agency of former President Hoover, was permitted to live on a bare subsistence diet, while other agencies grew fat with New Deal appointments and allocations of funds. The identity of the President and the character of his administrative policies and practices are therefore matters of vital concern to hundreds of thousands of government employees and their families. Since both politically and economically this group of employees

is a key group within the nation, the President's administrative leadership makes itself felt to the farthest reaches of American interests.

The Integration of Leadership. The three types of presidential leadership — national leadership, party leadership and administrative leadership — do not of course operate separately. The President does not divide his time among them according to some definite rule or schedule. Rather, he integrates them and to a considerable extent acts as if there were no real distinction among them. He is ordinarily concerned much more about the totality of his power than about the varied sources from which it comes or the categories into which it can be classified. The very fact that he has won election to the presidency, amid the hurly burly of practical politics, is evidence of the fact that he is likely to be much less of a political philosopher than a man of action.

Theodore Roosevelt, it is true, did pause to characterize the totality of his exercise of power as he approached the end of his period in office. He wrote to a friend,

> While I have been President I have been President, emphatically. I have used every ounce of power there was in the office and I have not cared a rap for the criticisms of those who spoke of my "usurpation of power"; for I know the talk was all nonsense and that there was no usurpation. I believe that the efficiency of this government depends upon its possessing a strong central Executive, and wherever I could establish a precedent for strength in the Executive . . . I have felt, not merely that my action was right in itself, but that in showing the strength of, or in giving strength to, the executive office, I was establishing a precedent of value.[6]

Other Presidents likewise found great potentialities in the office. Jackson's experience has been mentioned. In the face of the Civil War Lincoln announced his determination to save the Union and the constitutional system even if in doing so he found it necessary incidentally to violate some specific provisions of the Constitution. His methods were such as to lead Professor Corwin to characterize his administration as "Lincoln's Dictatorship."[7] Wilson, with his distrust of "congressional government," and with, like Lincoln, the responsibility of occupying the presidency in time of war, did his part to strengthen the tradition of presidential leadership. Franklin D. Roosevelt, facing emergencies created first by a disastrous depression and second by a major war, and with the dynamics seemingly characteristic of the Roosevelt personality, did more than any of his predecessors to expand the powers of the presidential office.

Other Presidents, either because of their personalities or their convictions, have taken constricted views of the powers of their office. James Madison, distinguished though he was for his pre-presidential achievements, was lamentably weak as a presidential leader, even in time of war. Martin Van

6. Joseph B. Bishop, *Theodore Roosevelt and His Time* (New York: Scribners, 1920), vol. 2, p. 94.
7. Corwin, *op. cit.*, p. 21.

Buren lacked the dynamic character of Old Hickory, his predecessor, and at the end of one term lost the presidency to the opposing party. James Buchanan sat out the latter part of his single term impotently bemoaning the fact that he had no constitutional power to save the Union. Rutherford B. Hayes surrendered much of his political power by announcing that he would serve only one term.

Still other Presidents have taken intermediate positions. President Truman, faced for a time by a Congress dominated by the opposing party, discussed the office as follows:

> I am only a servant of the people of the United States. I can only do what the law authorizes me to do as President of the United States. I am the enforcement part of the government of the United States for the laws that are passed by the Congress. That is my duty. That is what I am sworn to do.
>
> And people talk about the powers of a President, all the powers that a Chief Executive has and what he can do. Let me tell you something — from experience.
>
> The President may have a great many powers given to him in the Constitution and may have powers under certain laws which are given to him by the Congress of the United States, but the principal power that the President has is to bring them in and try to persuade them to do what they ought to do without persuasion. That's what I spend most of my time doing. That's what the powers of the President amount to.[8]

On other occasions, however, he could sharply remind Congress that "Under our form of government, the executive power is vested by the Constitution in the President."[9] He would tolerate no such congressional encroachment on executive jurisdiction as was involved in an attempt of Congress to empower a congressional committee to give directions to the Federal Bureau of Investigation in investigating the character of certain candidates for government employment.

Presidential Routine. Although habits vary somewhat from individual to individual,[10] the President, whoever he may be, spends most of his time consulting with and giving directions to other people. Franklin D. Roosevelt who, while breakfasting in bed, scanned several newspapers and began consultation with intimate advisers, was probably more nearly typical than Calvin Coolidge who, it is said, regularly had his head rubbed with vaseline while eating breakfast in his bedroom, and at times even had his hair cut while eating breakfast.[11] The hours in the middle of the day are ordinarily devoted to fifteen-minute or half-hour appointments, with other brief appointments sandwiched among them. The visitors are likely to include members of Congress, top men in the administration, influential party lead-

8. "Address to National Conference on Family Life," *Congressional Record,* May 10, 1948, vol. 94, part 10, p. A2831.
9. Veto message on S. 1004, 80th Cong., 2d sess., *Congressional Record,* May 17, 1948, vol. 94, part 5, pp. 5895–96.
10. For information about the activities of many different Presidents see Irwin H. Hoover, *Forty-two Years in the White House* (Boston: Houghton Mifflin, 1934).
11. *Ibid.,* p. 132.

ers, foreign dignitaries, and others. Schedules must be so arranged as to let the President present medals and citations; dedicate bridges, parks, and post offices; launch campaigns and drives of various sorts; and have his picture taken while doing so. In spite of the extent to which subordinates handle routine matters for him, a constant stream of papers including executive orders, nominations, notices of appointment, and other items flows to his desk for signature.

Late afternoons and evenings must provide time for reading reports, going over drafts of speeches, and gathering personal knowledge which the President must have. Social functions compete for this time, for the President must maintain a substantial program of entertainment. If out of a busy day he takes times for swimming, walking, driving, or other recreation, or if he goes fishing or takes a trip to Florida or to some other recreation spot or to a private hideout, he may have to fight off a sense of guilt for temporarily neglecting an endless stream of duties. Woodrow Wilson, it is said, so organized his time as to provide for ample recreation. Herbert Hoover, on the other hand, worked through virtually all his waking hours. Franklin D. Roosevelt took time for various trips, for swimming, for attending White House movies, reading fiction, and working at his stamp album. If for no other reason, the President must protect his health in order to keep up appearances. He must always look well and appear cheerful. If snapping cameras disclose a haggard visage, if press conferences reveal him in a state of weariness or irritability, or if after cabinet meetings his subordinates begin to comment that the chief is "slipping," the tide of rumor may endanger the success of his administration and the prospect of his reelection. It is a well-recognized fact that the presidency is a killing job. Only men with strong physiques and great equanimity and natural buoyancy of temperament can survive its rigors.

Presidential Aides. "I knew that this job would be too much for me," President Harding is said to have wailed in a period of despair.[12] President Truman has characterized the White House as "the big white jail."[13] Year by year the task gets bigger and the jail grows more confining. It is said that Calvin Coolidge managed to run the presidency with a staff of fifty secretaries, clerks, and other helpers. In 1948, by contrast,

> the executive office of the President has better than 1000 people on its payroll, occupies 134,000 square feet of floor space in three buildings and has an annual budget of $5,000,000.[14]

These aides must be the President's eyes and ears. They must sift information and appraise it for him. They must do research and serve as anony-

12. Remark to Nicholas Murray Butler, quoted by Allan Nevins "1920–32: The Sky Was the Limit," *New York Times Book Review*, April 25, 1948, p. 3.
13. Robert E. Sherwood, "'The Loneliest Official on Earth,'", *New York Times Magazine*, January 16, 1949.
14. Cabell Phillips, "How the President Does His Job," *New York Times Magazine*, January 14, 1948, p. 9.

mous authors of materials to be presented in his name. They must see that every need and every desire on his part is met with the greatest possible speed. As they grow in number they must take increasing care that they do not get so entangled in their own organization as to become a hindrance rather than a help.

The President's cabinet, consisting roughly of the heads of the several departments, now nine in number, and at times of certain additional officers, has been commonly regarded as his official family of advisers. For various reasons, however, their value as advisers is limited. They tend to think in terms of the welfare of their departments or of themselves rather than of the whole administration. Often they are appointed in payment of political debts rather than because the President wants or trusts them. They may be much more interested in succeeding the President than in serving him. Seldom is there that closeness of relationship between the President and the Vice President which would make of the latter a trusted assistant.

So it is that the President may come to rely heavily for advice on men not in official positions or men in positions not directly connected with the performance of functions about which they give advice. Jackson's little group of unofficial advisers were stigmatized by their critics as the "kitchen cabinet." They were a constantly changing group, but as a whole they undoubtedly had more influence on presidential policy than did the official cabinet. Until jealous politicians broke up the friendly relationship, President Wilson relied far more heavily on the advice of Colonel Edward M. House than on that of any other governmental employee. To his cost, President Harding relied too heavily on the "Ohio Gang." During the early years of his administration, Franklin Roosevelt had around him a constantly changing group which was both praised and stigmatized as a "brain trust." Raymond Moley and Rexford G. Tugwell gave way to Thomas Corcoran and Benjamin V. Cohen. Judge Samuel Rosenman and Robert E. Sherwood operated extensively behind the scenes. In the later years Harry Hopkins achieved a position of major influence. When Wendell Willkie, defeated Republican presidential candidate, asked Roosevelt why he kept Hopkins so close to him, knowing that the people distrusted Hopkins and resented his influence, Roosevelt replied that Willkie himself might be President some time, and that then

> you'll be looking at that door over there and knowing that practically everybody who walks through it wants something out of you. You'll learn what a lonely job this is, and you'll discover the need for somebody like Harry Hopkins who asks for nothing except to serve you.[15]

In the middle of the Roosevelt presidency, a Washington newspaper man had remarked that what the President needed was "another self, a self that is steadier, calmer, less harried, a little above the battle and therefore a better judge of it. Roosevelt needs a man who can hold his hand as House

15. Robert E. Sherwood, *Roosevelt and Hopkins: An Intimate History* (New York: Harpers, 1948), p. 3.

did Wilson's. He needs a shoulder to cry on." [16] In a limited sense Roosevelt found such a man in Hopkins.

Seldom, however, can close personal advisers transfer allegiance from one President to his successor and continue to render the same kind of assistance. In the loneliness of his "big white jail" President Truman turned for both advice and recreation to long-time friends from his native state. As a result he was denounced for surrendering power to "the Missouri gang" and for resorting to "government by crony."

Whatever the risk of being misled by selfish or biased advisers, the President must work in intimate association with a small group of people. The presidential stay is too short and too chopped up with diverse activities for the President alone to accumulate the information he needs, to think out important policies, and to draft speeches and other documents. Decisions must be his, but alternatives must be posed by advisers who have more time to think about them than he. Speeches and other documents must in the end be his, but for the most part other men must think out approaches and present him with drafts from which he can work out his own statements. Robert E. Sherwood, who for a time was one of Roosevelt's ghost writers, tells how after the cocktail hour and after dinner with the President he and Sam Rosenman and others worked with the President on speeches throughout the evening, and then far into the night after the President had retired, in order to have revised drafts ready for him in the early morning.[17] Roosevelt was a master at revising the language of other men to make it express not only his own ideas but his own personality. His speeches always "sounded like Roosevelt." President Truman has been less skillful at this kind of revision. His speeches, therefore, have seemed to change character as he changed ghost writers.

PRESIDENTIAL FUNCTIONS

Law Enforcement. The President uses the vast mechanism of the executive branch in obedience to the constitutional direction that he "take care that the laws be faithfully executed." In spite of the vastness of his power, he is by no means a free agent. "Although the Constitution provided an executive branch coordinate with the legislative, it was not independent. A delicate balance between them was forced into existence by the powers vested in each and by the checks of one against the other." [18] In large part, the President must accept the administrative mechanism as he finds it, a mechanism provided by Congress. For most administrative employees he must accept salary scales, the scheme of classification, and rules and regulations governing employment and removal. He must accept the body of federal law as he finds it — at least until he can persuade Congress to make desired changes. However much he may wish to enforce a statute against

16. Raymond Clapper, "F.D. Needs Adviser," *Washington Daily News,* March 29, 1938.

17. Sherwood, *op. cit.*, pp. 214–15.

18. Leonard D. White, *op. cit.*, p. 50.

monopolies, for example, he can do so only if one has been enacted by Congress, and he must accept the congressional enactment whatever its limitations; he cannot redraft it to suit himself. He may wish ardently to prevent discrimination against Negroes in the South or Orientals on the west coast or poorly organized workers in industrial areas, but he can do so only in terms of existing statutes. Within the area of existing law, however, he has more freedom than the language of the statutes would seem to indicate. Under anti-trust laws he can challenge every business combination with the zeal of a crusader, or he can limit the action of his agents to the more obvious offenders. He can wield the law vigorously on behalf of Negroes and with laxity on behalf of Orientals, or vice versa. Because the multitude of enforcement duties laid upon the executive branch outreaches the imagination of any one man, the interests and the policies of the President set the tone of administration for any given period. Even if the laws remain unchanged, therefore, the pattern of enforcement changes somewhat with every change in the presidential office.

Proposing Legislation. The Constitution links the President to Congress for the planning of legislation through the provision of Article II, Section 3, that

> He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper.

At the opposite pole from the recommendation of measures, the President has the power of veto over all bills and joint resolutions passed by the two houses, subject to the provisions and restrictions included in Article I, Section 7, which include the power of Congress to repass measures over the presidential veto by two-thirds majorities in each house.

All Presidents make some use of these powers both of recommending and vetoing legislation. Delivery of a "state of the union" message at the beginning of each session of Congress is a tradition which has been maintained since the first President met the first Congress. True, from the beginning of Jefferson's administration to the beginning of Wilson's, Presidents avoided the ceremony of personal appearance before joint sessions of the two houses for delivery of the conventional message, preferring rather to send it for delivery by the clerk of each house — and for duplicate printing in both the House and Senate wings of the *Congressional Record.* President Wilson revived the initial practice of appearing before a joint session of the two houses. He hailed it as an opportunity

> to verify for myself the impression that the President of the United States is a person, not a mere department of the government hailing Congress from some isolated island of jealous power, sending messages, not speaking natu-

> rally with his own voice — that he is a human being trying to co-operate with other human beings in a common service.[19]

Whether personal appearances of the President before Congress actually bring the two branches of the government closer together is a matter for question. It draws added attention to the President and perhaps enhances his prestige. It may strengthen his position as leader of his party in Congress and thereby improve his competitive position in the struggle for power between the two branches of the government, but it does not necessarily enhance voluntary cooperation.

It has been well said that

> Presidential speeches, particularly on the state of the Union, are usually put together like a grandmother's quilt — a few bits from each of the government departments, a few contributions from the Cabinet, and a few bright patches from the White House staff, all tacked together by some expert craftsman.
>
> When the process is directed by a real expert, particularly when care is taken to choose a dominant color and weave a clear pattern, the effect is striking.
>
> But without careful selection, without rigid rejection of the rags and tatters, and without a dominant theme and color, the finished product is not a speech but a catalogue, and not a report on the state of the Union, but a commentary on a state of mind.[20]

Some Presidents, including particularly Franklin D. Roosevelt, have been strikingly effective in the strategy of their messages, while many others, Herbert Hoover for example, have shown little more than mediocre skill in such matters.

During the course of a legislative session the President delivers other regular messages than that on the state of the Union, including the budget messages and messages on special subjects as legislative action on these subjects is sought. Communication between Congress and the President, furthermore, is by no means limited to the delivery of formal messages. Since the members of the President's party in Congress are the President's subordinates in party matters, it is often party subordination, rather than the alleged equality of Congress with the President, which determines the conduct of individual legislators. When the President's party is in power in Congress, and to some extent when it is not, he keeps in touch with his party leaders there in an attempt to influence the course of legislation. He may see them at the White House, he may talk to them by phone, or he may send messages to them by men who from time to time act as his spokesmen and observers "on the Hill." In any event he keeps in touch with party leaders and, as circumstances require, he establishes contact with other individual members. He may seek to influence their votes merely by the flattery which is implied in consulting them. In return for

19. James D. Richardson (ed.), *A Compilation of the Messages and Papers of the Presidents*, vol. XVII, p. 8033.

20. James Reston, "Truman Message Shows Lack of Cabinet Analysis," *New York Times*, January 8, 1948.

their cooperation he may promise, or imply a promise, to make appointments or support legislation desired by the legislator. Or he may make or imply a threat to withdraw favor or seek political reprisal if the legislator proves obstinate.

In such matters, it is true, the President must be a good judge of his man and of the situation. He must remember that some issues involve the integrity of individual legislators and their sense of responsibility to themselves, to their constituents, and to the country. Too much coercion may bring a revolt and do the President more harm than good. Like other political processes, therefore, the process of influencing legislators must have adequate "play at the joints." It must be restrained as it runs into personal convictions, the legislator's sense of the dignity and independence of Congress, and the local pressures which require a legislator to deviate from positions taken by party leaders.

Executive Drafting of Bills. Before the New Deal period it was only on rare occasions that the President or his subordinates drafted bills and sent them to Congress for introduction. Congress was jealous of its prerogatives in such matters, and too much activity on the part of executive officers was likely to bring complaint about executive invasion of the legislative field. During the New Deal period, however, when the administration planned a whole series of interrelated measures to get the country out of the depression and to curb the kind of evils that had brought the depression about, it became a general practice to submit administration bills for enactment. Those in which the President was particularly interested were informally labeled "must" legislation. Through the experience of that period the introduction of bills prepared and sponsored by the President came to be accepted as good form.

Bills drafted and submitted by executive agencies are not limited to those in which the President has a deep interest and which he will use political pressure to have enacted. Bills are drafted from time to time in the various departments and agencies in terms of their own interests and needs. This accumulation of bills for presentation to Congress does not necessarily reflect an overweening desire in executives and administrators to invade the jurisdiction of Congress. It often means that the need for particular items of legislation can at first be more clearly visualized by administrators working on a particular subject than by legislators for whom the subject in question is only one of hundreds which demand attention.

Sifting by the Bureau of the Budget. If permitted to flow unchecked from departments and agencies with overlapping jurisdiction and from administrators with rival ideas of what ought to be done, the stream of bills would reveal a tremendous amount of inconsistency and conflict. Such conflict would confuse Congress, would emphasize the lack of integrated policy in the executive branch, and would reduce the probability that any such legislation at all would be enacted. To avoid the results of such con-

flict, all executive agencies are required to submit their legislative proposals to the Legislative Reference Division of the Bureau of the Budget [21] for decision whether they are in accord with the program of the President. Bills may then be submitted to Congress whether or not the Bureau gives its approval, but they must incorporate a statement whether they have been found to be in accord with the President's program. The Director of the Bureau of the Budget has explained as follows this work of his agency:

> After a bill is introduced referring, say, to personnel operations in the Navy Department, and it is referred to the Navy Department by the congressional committee for a report, the Navy Department sends its suggested report to the Bureau and we are responsible for obtaining the views of any other department or agency of the government that is concerned with that bill, and then advising the Navy Department as to whether its views or expressions can be considered in accord with the program of the President. This enables the Congress to have an expression of views that have been coordinated rather than to have several different conflicting recommendations from several different agencies of the government.[22]

Such attempts at coordination of executive advice help considerably to eliminate confusion, though a certain amount of diversity always remains. If the President is lacking in influence with his party, or if the opposing party is in control of Congress, agency policies which conflict with those of the President may be accepted in preference to those he sponsors. Congress may, for example, support appropriations for a stronger air force than the President desires if this is advocated by the Department of the Air Force. Such action by Congress may reflect either the considered judgment of Congress in the matter or its desire to embarrass the President by ostentatious rejection of his advice for that of his subordinates. When the latter motive is dominant, it is not likely to be frustrated by any kind of machinery that can be set up in the executive branch.

Approval of Bills. Bills passed by Congress and submitted to the President for approval are appraised in somewhat similar fashion. An officer of the Legislative Reference Division of the Bureau of the Budget has described the process as follows:

> Upon passage of a bill by both houses of Congress it goes to the Government Printing Office for printing in enrolled-bill form, and for return to the Capitol for the signature of the Speaker of the House and the President of the Senate.
>
> The enrolled bill is then presented to the President for approval or disapproval. At the time of printing the enrolled bill the Government Printing Office prints a number of facsimile copies of the bill and dispatches them to the Bureau of the Budget.

21. For discussion see Fritz Morsten Marx, "The Bureau of the Budget: Its Evolution and Present Role," *American Political Science Review*, vol. XXXIX (October, 1945), pp. 882–83, and materials cited.

22. Testimony of James E. Webb, Director, Bureau of the Budget, *Independent Offices Appropriation Bill for 1949*, House Appropriations Committee Hearings, 80th Congress, 2d sess., p. 1161.

> This Office immediately sends one of these facsimiles to the head of each department affected by the provisions of the bill, with a request that the Bureau be advised of the recommendation of the department head with respect to the action that the President should take in approving or disapproving the measure.
>
> Since the President has but 10 days from the time he receives the bill — exclusive of Sundays — in which to act upon it, an enrolled bill is accorded in the Budget Bureau and in the departments first priority over all other business.
>
> If the President does not act within 10 days the bill becomes a law, except that a bill not signed within 10 days from the end of a Congress becomes what is known as a pocket-vetoed bill.
>
> Upon receipt of the recommendations of the department heads, the Director of the Budget prepares his own recommendations, and submits them, with the departmental recommendations, to the President. If the department head, or the Director of the Budget, recommends disapproval of the bill, his recommendation is accompanied by a draft of veto message for consideration of the President.[23]

Ordinarily the President makes no public explanation of his action when he signs a bill. If it is a measure of outstanding importance he frequently permits himself to be photographed while affixing his signature in the presence of the principal advocates or sponsors of the bill. Under such circumstances he sometimes uses a number of pens in the process of signing, thereafter distributing them to sponsors as souvenirs. If a bill contains provisions to which the President is known to have serious objections but if it is nevertheless so important that he is unwilling to veto it he may issue an explanatory statement of his actions.

The Veto Power. Just as the President uses political influence to secure the enactment of bills in which he is interested, so also he uses it to prevent enactment of measures to which he is opposed. If his influence proves ineffective, he can still fall back upon his veto power. If he meets a bill with a direct veto he must return it to the house in which it originated with an explanatory message. The veto message is usually prepared with all the skill of the governmental agency most affected, and is inspected and revised by the Bureau of the Budget and the Department of Justice and perhaps by the President himself. Having an origin with interested parties, a veto message can easily display more venom than it is diplomatic to reveal, thereby producing bitter resentment in Congress. An outstanding example was President Roosevelt's veto of the Revenue Act of 1944, presumably prepared in the Treasury Department, in which he denounced the measure as "not a tax bill but a tax relief bill providing relief not only for the needy but for the greedy. . . . The bill is replete with provisions which not only afford indefensible special privileges to favorite groups, but sets dangerous precedents for the future." [24]

23. *Investigation of Civilian Employment,* House Civil Service Committee Hearings, 78th Congress, 1st sess., pp. 360–61.
24. *Congressional Record,* February 22, 1944, vol. 90, part 2, p. 1959.

If each house repasses the measure over the veto of the President by a two-thirds vote, it becomes a law in spite of presidential objections. The tax measure above was passed over the veto in a wave of congressional indignation at the scolding administered by the President. Two-thirds votes are relatively hard to secure on measures controversial enough to provoke a presidential veto, however, and relatively few vetoed measures ever become law.

The Pocket Veto. If Congress remains in session for ten days in addition to Sundays after the date of sending a bill to the President, and if he fails to sign it within that period, it becomes a law without his signature. On the other hand if Congress adjourns before the end of the ten day period and if the President withholds his signature, the bill does not become a law. The procedure of killing bills by holding them beyond the expiration of a congressional session is called a pocket veto. If the President kills a bill by pocket veto he may explain his reasons to the ensuing session of Congress, but he has no constitutional obligation to do so.

The Significance of the Veto. In practice the veto is used sparingly. No President would dare bring down upon himself the wrath of Congress and the people by attempting to defeat all measures which Congress passes. The device operates as a heavy check, however, to restrain the enactment of biased measures submitted on the spur of the moment and perhaps driven through by powerful pressure groups. The threat of a presidential veto, with the adverse publicity which comes with publication of the President's criticism, often has the effect of modifying the texts of bills pending in Congress. The President does not have the power to veto particular items in a bill while permitting other provisions to stand. In the instance of appropriation bills, therefore, and other measures so important that their enactment is essential to the welfare of the administration or of the people, legislators sometimes include undesirable items or attach "riders" which the President would reject but for the necessity of approving the major provisions of the bills. A constitutional amendment authorizing the President to veto selected items without rejecting the measure as a whole would add greatly to his power. Such a step might or might not be desirable. Under the present arrangement it is sometimes suspected that Congress yields to pressure for the enactment of undesirable measures because of the expectation that the President will prevent the threatened evils by exercising his veto power. If he had the power of item veto, it is possible that to an even greater extent Congress would shift to the President the responsibility for making decisions on highly controversial matters.

Appointment of Officers. Much of the influence of the President over administration, and over legislation as well, derives from his appointing power. The constitutional authorization, in Article II, Section 2, reads as follows:

> He shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The part of this authorization dealing with inferior officers, on the basis of which Congress provides for appointments according to a merit system, will be discussed in a later chapter. Our concern here is with those appointments which are made by the President by and with the consent of the Senate, and particularly with those in the executive branch of the government, since the personnel of the judiciary can be better discussed in a chapter dealing specifically with the judiciary.

The President is at liberty to nominate for any office within his jurisdiction any person who is not in some way legally disqualified to serve. In actuality, however, he must give heed to considerations of region, party service, and other factors. No President would think of selecting all the members of his cabinet from one section of the country, even if he felt sure that all the best men were to be found there. There is a kind of unwritten law to the effect that all major sections must be represented and must share the major spoils of office, and the President who violates that law endangers his political career. United States attorneys and marshals, revenue collectors and various other federal officers, are normally appointed from the areas in which they are expected to serve.

The rules of the political game sometimes dictate that offices be given in return for political support even if no agreement to that effect is made in advance, and even if such an agreement would violate federal law. Woodrow Wilson, who before election to the presidency had yearned to see William Jennings Bryan "knocked into a cocked hat," found it politically necessary to put Bryan in his leading cabinet position, that of Secretary of State. Louis Johnson, who is said to have raised a million and a half dollars to bring about the reelection of President Truman, was rewarded by appointment to the position of Secretary of Defense. Ambassadorial posts have often been distributed primarily as rewards for financial and other types of support.

Participation of the Senate. The requirement that major appointments have the consent of the Senate is one of the many devices for distributing responsibility in the federal government and for placing checks upon the exercise of powers which, without restraint of some kind, might be seriously abused. Presidents often writhe under the necessity of submitting important nominations when the Senate may reject them. Nominations for cabinet positions which represent the President's choice of his official family are seldom rejected. The same is true of nominations for positions of under secretary and assistant secretary in the various departments which constitute what is informally known as "the little cabinet."

Senatorial Courtesy. Other nominations, however, undergo the sharpest scrutiny. A prime consideration is "senatorial courtesy" — a phrase which implies no obligation of courtesy on the part of the Senate toward the President, but is an agreement among senators that they will support presidential nominees only if they have the support of the majority party senators of their own states. The device is one for securing for senators an equitable distribution of patronage in major appointments. Since senators are generally supposed to know their constituencies better than the President can possibly know them, this device of senatorial veto for local appointments may not be altogether bad. It is definitely bad at times, however, when it provides for the venting of senatorial spleen against able men from their states who have incurred their political enmity. Apart from the issue of senatorial courtesy, senatorial consideration of appointments may stand in the way of good government if personal and political considerations prevent the appointment of good men, and if the prospect of being investigated and hounded by Senate committees means that good men will refuse to permit submission of their names for appointment. The evil may be no greater, however, than that of having important positions filled exclusively by decision of the President and his clique of intimate advisers.

Committee Consideration. Presidential nominations are referred to the relevant committee of the Senate. Unless the nominee is himself a senator or a former senator, the committee or a designated subcommittee usually holds hearings on his qualifications. Senatorial nominees are usually assumed to be above suspicion, so that formal inquiry concerning them may be omitted. Both parties are represented on the examining committee, and favorable and unfavorable testimony is invited. The candidate himself may be permitted or even asked to appear to explain his record. If the nominee is subject only to superficial criticism, the public hearing may do a great deal to clear the air. If on the other hand he has bitter political enemies, or if he has a philosophy of government to which particular senators are hostile, hostile charges are likely to be made and the defendant given widespread publicity.[25] When nominees are chosen for their ability to perform important functions, their backgrounds are likely to be thoroughly investigated by the Federal Bureau of Investigation or some other investigative agency before nominations are submitted to the Senate. Senate committees have no such investigative equipment as that represented by the FBI. In order to secure the use of this equipment, Congress in 1948 passed and sent to the President a bill to authorize the Senate members of the Joint Committee on Atomic Energy to require that the FBI investigate for them the character, associations, and loyalty of persons nominated under

25. See for example *Confirmation of Atomic Energy Commission and General Manager,* Hearings, Senate Section of Joint Committee on Atomic Energy. 80th Cong., 1st sess., on the nomination of David E. Lilienthal to the chairmanship of the Atomic Energy Commission. The core of hostility to Mr. Lilienthal was represented by Senator Kenneth McKellar. See questioning by Senator McKellar at various points throughout the Hearings.

the Atomic Energy Act of 1946. President Truman vetoed the bill largely on the grounds that in authorizing senators to give directions to the FBI the measure would "permit an unwarranted encroachment of the legislative branch upon the executive branch." [26] The President promised that in making nominations to the Atomic Energy Commission every facility of the executive branch, including the FBI, would be used to discover the fitness of candidates, but he denied the right of the Senate to the services — and presumably to the findings — of that agency. After a heated debate over the respective powers of the two branches of the government, Congress failed to provide the two-thirds majority necessary to pass the bill over the veto.

If a congressional committee votes unfavorably on a presidential nominee, the probability that the Senate will follow the recommendation of the committee may lead the President to withdraw the name, or may lead the nominee himself to ask that his name be withdrawn. If the name is not withdrawn, the battle will eventually be transferred to the floor of the Senate. In earlier years most debates on nominations were held in executive session, that is, at sessions from which public observers are excluded. In more recent years most controversial political battles of this kind have been fought out in public. If the Senate is sharply divided, the President is likely to use all available techniques to avoid losing a public battle. Even so he often goes down to defeat and has to select another nominee.

Minor Appointments. The selection of major appointees through presidential nomination and senatorial confirmation enables the President, under the watchful eyes of the Senate, to shape policy within his administration. It gives him control which he must have if he is to assume responsibility for operation of the vast administrative mechanism. When presidential appointments run into thousands each year, however, as they now do, it is impossible for the President to know personally the great mass of his nominees. The selections are therefore made by a hierarchy of subordinate politicians, or of professional hierarchies such as those which dominate the army and navy. Transfer of many currently appointive offices to control under the merit system is badly needed. Some senators, however, including McKellar of Tennessee, have made periodic efforts to expand senatorial control over appointment to inferior offices. Such expansion would be a step in the wrong direction. The existing arrangement for choosing superior officers is intended to enable the President to surround himself with subordinates with whom he can cooperate effectively, subject to senatorial restraint on unwise choices. It is not intended to burden the President with the selection of masses of employees whom he cannot possibly know or adequately appraise for the routine task of government, or to provide political patronage for members of the Senate.

Removal of Officers. As far as constitutional restrictions are concerned,

26. *Congressional Record*, May 17, 1948, vol. 94, part 5, pp. 5895–96.

any executive or administrative officer appointed by the President with the consent of the Senate may be removed by him without senatorial concurrence in the removal. It may not be politically safe to remove him; an officer may be so popular with the people or with powerful interests that his removal would be disastrous for the President, but the matter is one of expediency and not of constitutionality. With other types of appointees the situation is different. Federal judges serve during good behavior and can be removed only by impeachment. In other agencies of the government, the independent regulatory commissions, such as the Interstate Commerce Commission, there are officers whose functions are classified as quasi-legislative or quasi-judicial rather than executive or administrative, and whom Congress may protect wholly or in part from presidential removal. The categories of such officers are not sharply defined, and no one knows how extensive they are.[27] Within them the President can nominate but cannot necessarily remove.

The Conduct of Foreign Affairs. Other important presidential functions, including the conduct of foreign affairs and the command of the Army and Navy, are mentioned but briefly at this point because they must be discussed at length in later chapters. The scope of the power of the executive is broader in foreign than in domestic affairs. He personalizes the nation abroad even more completely than at home. All negotiations with foreign nations are supposed to be conducted by the President and his subordinates. Because the machinery of the foreign service operates under his direction, he is far better informed about foreign affairs than is Congress — by contrast with domestic affairs, where members of Congress may in some respects be better informed than the President. Because of this difference, almost anything that enhances the importance of foreign affairs among the activities of the government also enhances the power of the President. In recent years the over-all importance of relations with other governments has vastly increased and seems likely to continue to loom large, with resulting increase in the power and prestige of the presidential office.

Command of the Army and Navy. Article II, Section 2, of the Constitution provides that the President shall be commander-in-chief of the Army and Navy. It does not say whether his leadership shall operate in detail or only through the making of appointments and the determination of major lines of policy. President Washington rode at the head of his troops at the time of the Whiskey Rebellion. Other presidents in times of military conflict have had less military ability and prestige than Washington and have been content to leave the actual direction of military operations to others. Even so, strong Presidents in time of war, including Lincoln, Wilson, and Franklin D. Roosevelt, have exercised broad power over military operations. More important, perhaps, they have used power made available

27. For the relevant cases see *Myers* v. *United States,* 272 U.S. 52 (1926) and *Rathbun (Humphrey's Executor)* v. *United States,* 295 U.S. 602 (1935).

during the war emergency to mobilize the technically non-military resources of the country for war purposes.

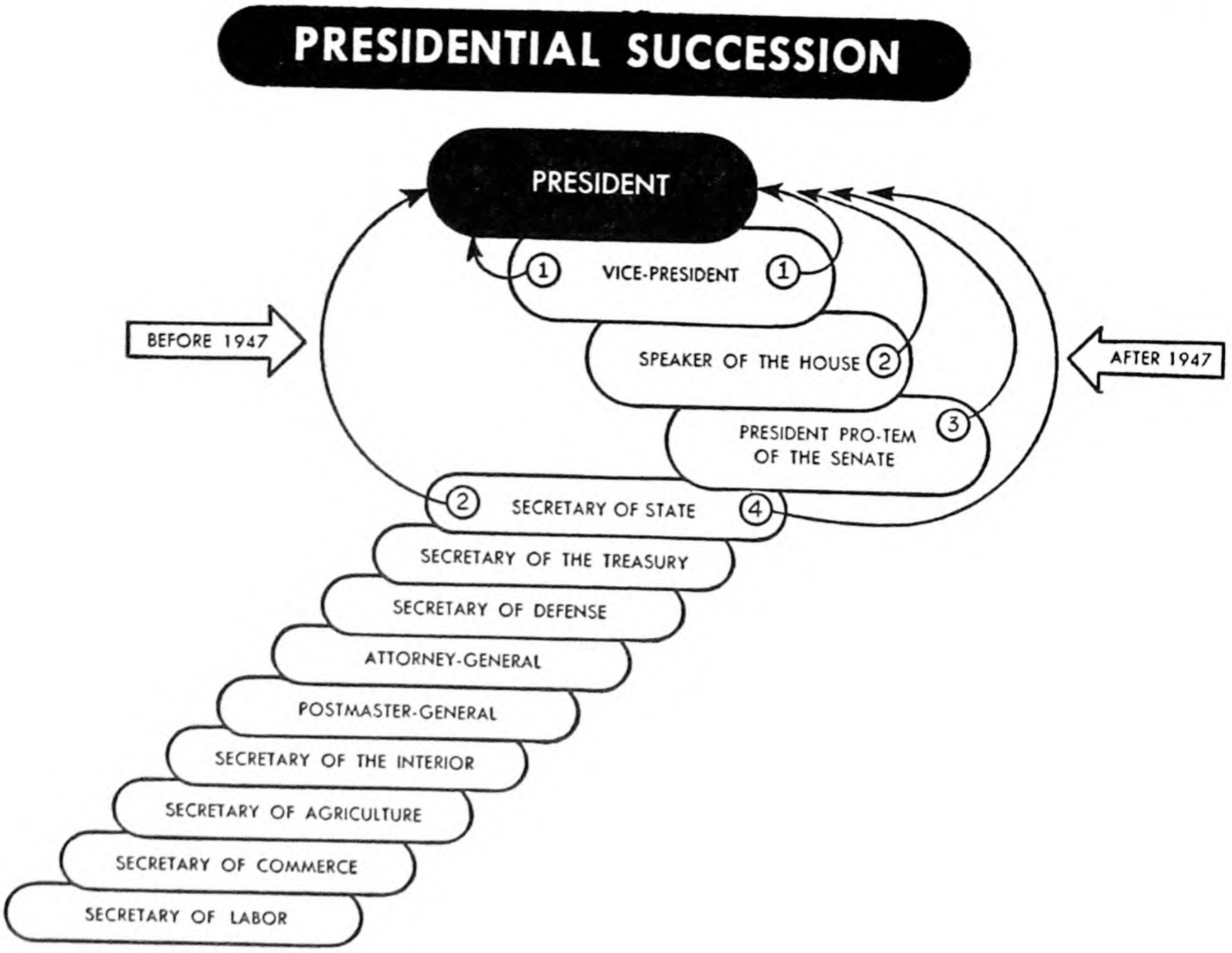
In times past, the existence of a state of war has been in our experience the exception rather than the rule. We have been in no great danger from abroad. We have therefore found it easy to keep the military subject to civil power. With the development of new methods of warfare, all this is now changed or subject to change. Military expenditures run to many billions each year, and the Department of Defense is a formidable concentration of power in the government. It is subject to the command of the President. It remains to be seen whether in actuality it will remain subservient to him or whether a weak President might become the instrument of the military aggregation.

THE PRESIDENTIAL SUCCESSION

The Vice President. The Vice President is elected primarily to take over the duties of the President "in case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office." While the President is exercising his own functions, the Vice President has no constitutionally prescribed duties except to preside over the Senate. This dearth of duties creates problems. If the Vice President is big enough to take over the duties of the presidency in the event of a certain grim occurrence, he will be restless in his lack of important occupation. He will be an embarrassment to other men of his own or lesser dimensions who have responsibility for getting things done. He is likely to be something of an embarrassment to the President himself. Some Vice Presidents attempt to make something out of the presidency of the Senate. That can be done to some extent by a Jack Garner or a Harry Truman or an Alben Barkley who knows the ways of Congress. It cannot be done by a man like Charles G. Dawes, who might conceivably have made a good President but who in 1925 disclosed his ineptitude before the Senate by a kind of inaugural lecture on the need for limiting senatorial debate.

If the Vice President is acceptable to the legislators he may serve as an effective agent of the President at the Capitol — provided further that he is willing completely to subordinate himself to the policy of the President. Sporadic attempts have been made to school him for possible presidential succession by having him attend cabinet meetings and participate in the discussion of general problems. During World War II President Roosevelt attempted to use Vice President Wallace by placing him at the head of the Board of Economic Warfare. As a result the country witnessed the unseemly spectacle of a Vice President engaged in wrangling with a Secretary of Commerce over the handling of important economic matters, and the President was compelled to abolish the agency and recreate it under another name to get the Vice President out of the picture.

In short, while the vice presidency has usually been deemed a necessary



safeguard, the office has at the same time constituted a mild embarrassment and irritation. While seven Vice Presidents have had to take over presidential duties, the others have had no such opportunity. They have been gentlemen in waiting who, in the process of waiting for an event which in all probability would not occur, have not quite known what to do with themselves. No one else has known either. Apart from the duties already mentioned, and the performance of such ceremonial duties as the President could shift from his own shoulders, they have had little to do but wait.

The Further Line of Succession. During no administration thus far has the country lost both a President and a Vice President. Such a loss is within the range of possibility, however, and the Constitution authorizes Congress to declare what officer shall act as President under the circumstances.[28] Until a change was made in 1947, it was provided by statute that the Secretary of State should succeed to the presidency, and that the line of succession thereafter should consist of the heads of the executive departments in the order in which the departments had been created. The President and members of Congress became dissatisfied with this arrangement at the time when Vice President Harry Truman had succeeded to the presidency and when the Department of State was headed by Edward R.

28. For constitutional provisions see the Twentieth Amendment, section 3.

Stettinius, Jr. who, for all his experience at holding various offices, had had no experience in winning office through election. To make less probable the occupation of the presidency by a man who lacked such experience, Congress changed the statute to place the speaker of the House of Representatives and the president pro tempore of the Senate in advance of cabinet members in the line of succession. This arrangement has various flaws. Among them is the fact that both these officers might conceivably lack qualifications for the office apart from those necessary for local election as representative or senator and for continuance in office long enough to succeed almost automatically to the presidency of the respective houses. If the succession were to take place near the end of a presidential term it might not greatly matter that none of the officers in line had been chosen by a national electorate or had been chosen primarily with the presidency in mind. If the succession involved national leadership for a considerable period, two or three years for example, it would be much better to choose a new President by special election.

SUMMARY AND CONCLUSION

Briefly, then, the presidential office is a compound of leadership, personnel and agency management, and law enforcement. It involves leadership of the nation, of a political party, and of the personnel of the executive branch of the government with the three types of guidance intermingled. The leadership is not that of a Nazi Fuehrer or a Fascist Duce. It is not even the ceremonial leadership of a constitutional monarch. While the President personalizes the nation and the political and administrative groups he heads, he cannot enrich himself at the expense of the people, victimize the people for the fulfillment of his personal whims and desires, or perpetuate himself in office. For the length of his presidency he is permitted to occupy the White House — except that President Truman had to be provided with other quarters during White House renovations. He is provided with a salary of $100,000 a year which is subject to the same income taxation as the salaries of the rest of the American people, an additional tax-free allottment of $50,000 a year to be spent according to his best judgment without an accounting, and an additional allowance of some $40,000 a year for travel, entertainment, and other necessary expenses. While the income is a comfortable one by comparison with the incomes of the rank and file, a considerable number of corporation executives, movie stars, and others, have vastly more.[29]

The Constitution and the federal statutes confer broad powers upon the President. He must exercise those powers, however, in the light of the fact that the executive branch must function in coordination with the legislative and judicial branches. Furthermore, most of the powers he enjoys, and most of his leadership, could be quickly taken away. For treason, bribery,

29. See David Cushman Coyle, "Movie Mogul $800,000 — Truman, $100,000," *New York Times Magazine,* January 30, 1949, p. 5.

or other high crimes and misdemeanors he could be impeached by the House of Representatives and on conviction at a trial before the Senate, he could be removed from office. No President has ever been so removed — although Andrew Johnson retained his position by the narrow margin of a single vote — but the possibility is always there. Apart from the payment of his salary, Congress could refuse to make appropriations for executive expenditures which the President might wish to make.[30] Congress could, and to a very limited extent does, from time to time, confer powers directly upon the President's nominal subordinates so that they could operate without subjection to his authority. His political leadership could be lost if the leaders and members of his party saw fit to abandon him.

In brief, the President holds his position of leadership largely on sufferance. It will not be casually taken from him, but he knows that he exercises his prerogatives as a condition of his working with the other branches of the government and exercising his administrative and political leadership as the people expect it to be exercised. The presidential office, therefore, like the legislative branch of the government, stands as a symbol of the working of democracy. The legislative-executive relationship, as ideally planned, is a symbol of the maturity of a self-governing people, of a people which has the capacity to delegate power and to submit to the exercise of that power over them, but who at the same time remain in a position to require that the power delegated shall be exercised in a high degree conformably to the popular will. There was a time during World War II when in all probability Franklin D. Roosevelt was the most powerful ruler in all the world, yet that rulership was but an expression of the will as well as the power of the American people. There was never a possibility that it was permanently conveyed or that serious abuse of the power conferred would be long tolerated.

References

Charles A. Beard, *President Roosevelt and the Coming of the War,* 1941 (Yale University Press, 1948).

Louis Brownlow, *The President and the Presidency* (Public Administration Service, 1949).

Edward S. Corwin, *The President: Office and Powers; 1789–1948* (New York University Press, 3rd ed., 1948).

Josephus Daniels, *The Wilson Era; Years of Peace 1910–1917* (University of North Carolina Press, 1944).

———, *The Wilson Era; Years of War 1917–1923* (University of North Carolina Press, 1946).

Marshall E. Dimock, *The Executive in Action* (Harpers, 1945).

James Hart, *The American Presidency in Action, 1789. A Study in Constitutional History* (Macmillan, 1948).

E. Pendleton Herring, *Presidential Leadership* (Farrar & Rinehart, 1940).

30. Although the President's salary may not be diminished (or increased) during his term of office there would presumably be no way of compelling Congress to appropriate funds for his salary if the legislators were determined not to make the appropriation.

Irvin H. Hoover, *Forty Two Years in the White House* (Houghton Mifflin, 1934).
Harold J. Laski, *The American Presidency* (Harpers, 1940).
George F. Milton, *The Use of Presidential Power, 1789–1943* (Little, Brown, 1944).
Frances Perkins, *The Roosevelt I Knew* (Viking, 1946).
Henry F. Pringle, *The Life and Times of William Howard Taft* (Farrar and Rinehart, 1939).
———, *Theodore Roosevelt, A Biography* (Harcourt, Brace, 1931).
James D. Richardson, *A Compilation of the Messages and Papers of the Presidents* (Government Printing Office, 1896–99).
Karl Schriftgiesser, *This Was Normalcy, an Account of Party Politics During Twelve Republican Years, 1920–1932* (Little, Brown, 1948).
Robert E. Sherwood, *Roosevelt and Hopkins* (Harpers, 1948).
Carl B. Swisher, *American Constitutional Development* (Houghton Mifflin, 1943).
Bascom N. Timmons, *Garner of Texas* (Harpers, 1948).
Leonard D. White, *The Federalists, a Study in Administrative History* (Macmillan, 1948).

16

Federal Departmentalization

The President cannot get the work of the federal government done merely by hiring two million employees and telling them to read and enforce the existing body of law. In order to make use of his employees he must have a pattern of organization. He must be able to group them according to the functions they are to perform and must provide for smooth relations among individuals and group. While the work of government can not be carried on by assembly line techniques such as those employed in large manufacturing establishments, it does have to have organization and routines of operation which somewhat resemble the assembly line. The collection of taxes, for example, requires not only a taxing statute but also an organization of people to do the collecting, check the returns, and take action against those who fail to make their rightful contributions. Distribution of benefits to veterans requires not only an appropriation of funds but an organization to find out who should receive the funds and to make the distribution. Enforcement of anti-trust laws requires an organization of technical investigators and prosecutors. Other activities similarly require the organization of employees of particular skills.

Problems of organization to get things done have existed in all groups from time immemorial, and people have devised broadly similar ways of solving them. At the time of the drafting of the federal Constitution the habit of organizing the administrative work of government into departments, ministries, or other groupings with varying titles had become so well established that the framers took it for granted and made only incidental mention of departments. Today the administrative work of the federal government is allocated to nine agencies which are characterized by statute as executive departments and to other agencies which are called by such names as commissions, corporations, and administrations. The executive departments, the heads of which constitute the President's cabinet, generally have the highest prestige for that reason as well as others.

THE EXECUTIVE DEPARTMENTS

Major Groupings. As amended by an act of August 10, 1949, the *United States Code* lists the nine executive departments as

The Department of State
The Department of the Treasury
The Department of Defense
The Department of Justice
The Post Office Department
The Department of the Interior
The Department of Agriculture
The Department of Commerce
The Department of Labor.[1]

This order of names represents their order in rank and, apart from certain changes in names, represents the order in which the departments were created. The Department of State is concerned primarily with the conduct of foreign affairs. The Department of Defense attempts to unify under single-headed direction three military departments, the Department of the Army, the Department of the Navy, and the Department of the Air Force, which do not have executive department status. The Department of the Treasury is concerned with the collection of revenue and with making expenditures as prescribed by law. The Department of Justice, the major law office of the federal government, advises the President, the executive departments, and other government agencies on legal matters and conducts government litigation in the federal courts. The Post Office Department distributes mail. The Department of the Interior has long been a kind of catch-all department, having charge of such matters as the distribution of public lands, the management of national parks, the irrigation of arid lands, and the conservation of natural resources generally. The Department of Agriculture is concerned with the promotion of the welfare of agricultural interests and the betterment of farming methods. The Department of Commerce is concerned with the promotion of trade and industry. The Department of Labor is concerned with the promotion of the welfare of labor.

Differentiation of Functions. Establishment of the executive departments marked the attempt of the federal government to divide its administrative work into major groupings. Such grouping is supposed to enable the President easily to reach down into the major administrative fields through the chain of command within the respective departments. To a considerable extent, the present departmental set-up represents a practicable division of administrative subject matter. The major functions of the Department of State are not likely to get confused with those of the Department of Labor, or those of the Department of Defense with those of the Department of Commerce, and so on. Yet all the activities of the government are to some extent interrelated. Departmental jurisdictions blur at the fringes, and the

1. *United States Code*, Title 5, sec. 1.

EXECUTIVE BRANCH OF THE GOVERNMENT

THE PRESIDENT OF THE UNITED STATES

EXECUTIVE OFFICE OF THE PRESIDENT

- 3 MEMBERS — COUNCIL OF ECONOMIC ADVISERS
- DIRECTOR — BUREAU OF THE BUDGET
- STAFF — THE WHITE HOUSE OFFICE
- EXECUTIVE SECRETARY — NATIONAL SECURITY COUNCIL
- CHAIRMAN — NATIONAL SECURITY RESOURCES BOARD

DEPARTMENTS AND AGENCIES

- SECRETARY — DEPARTMENT OF STATE
- SECRETARY — DEPARTMENT OF THE TREASURY
- SECRETARY — DEPARTMENT OF DEFENSE
- ATTORNEY GEN. — DEPARTMENT OF JUSTICE
- POSTMASTER GEN. — POST OFFICE DEPARTMENT
- SECRETARY — DEPARTMENT OF THE INTERIOR
- SECRETARY — DEPARTMENT OF AGRICULTURE
- SECRETARY — DEPARTMENT OF COMMERCE
- SECRETARY — DEPARTMENT OF LABOR

MULTI-HEADED AGENCIES

- 5 COMMISS'ERS — SECURITIES AND EXCHANGE COMMISSION
- 7 MEMBERS — BOARD OF GOVERNORS OF THE FED RESERVE SYSTEM
- 5 MEMBERS — NATIONAL LABOR RELATIONS BOARD
- 11 COMMISS'ERS — INTERSTATE COMMERCE COMMISSION
- 5 COMMISS'ERS — FEDERAL TRADE COMMISSION
- 5 COMMISS'ERS — FEDERAL POWER COMMISSION
- 7 COMMISS'ERS — FEDERAL COMMUNICATIONS COMMISSION
- 5 MEMBERS — CIVIL AERONAUTICS BOARD
- 5 COMMISS'ERS — UNITED STATES MARITIME COMMISSION
- 3 MEMBERS — NATIONAL MEDIATION BOARD
- 5 COMMISS'ERS — ATOMIC ENERGY COMMISSION
- 3 MEMBERS — RAILROAD RETIREMENT BOARD
- 6 COMMISS'ERS — UNITED STATES TARIFF COMMISSION
- 15 MEMBERS — NAT. ADVISORY COMMITTEE FOR AERONAUTICS
- 11 COMMISS'ERS — AMERICAN BATTLE MONUMENTS COMMISSION
- 3 DIRECTORS — TENNESSEE VALLEY AUTHORITY
- ADMINISTRATOR — FEDERAL SECURITY AGENCY
- ADMINISTRATOR — GENERAL SERVICES ADMINISTRATION
- ADMINISTRATOR — HOUSING AND HOME FINANCE AGENCY
- ADMINISTRATOR — VETERANS ADMINISTRATION
- DIRECTOR — FEDERAL MEDIATION AND CONCILIATION SERVICE
- 5 DIRECTORS — RECONSTRUCTION FINANCE CORPORATION
- 3 DIRECTORS — FEDERAL DEPOSIT INSURANCE CORPORATION
- 5 DIRECTORS — EXPORT-IMPORT BANK OF WASHINGTON
- 14 REGENTS — SMITHSONIAN INSTITUTION
- 3 COMMISS'ERS — UNITED STATES CIVIL SERVICE COMMISSION
- 10 COMMISS'ERS — NAT. CAPITAL PARK AND PLANNING COMMISSION
- 5 MEMBERS — NATIONAL CAPITAL HOUSING AUTHORITY
- 7 COMMISS'ERS — COMMISSION OF FINE ARTS
- 16 JUDGES — TAX COURT OF THE UNITED STATES
- 3 MEMBERS — DISPLACED PERSONS COMMISSION
- 3 MEMBERS — MOTOR CARRIER CLAIMS COMMISSION
- 3 MEMBERS — WAR CLAIMS COMMISSION
- 3 COMMISS'ERS — PHILIPPINE WAR DAMAGE COMMISSION
- 3 COMMISS'ERS — INDIAN CLAIMS COMMISSION
- ADMINISTRATOR — PHILIPPINE ALIEN PROPERTY ADMINISTRATION (OFFICE OF EMERGENCY MANAGEMENT)
- EXPEDITER — OFFICE OF THE HOUSING EXPEDITER
- ADMINISTRATOR — ECONOMIC COOPERATION ADMINISTRATION
- 3 MEMBERS — NATIONAL SELECTIVE SERVICE APPEAL BOARD
- DIRECTOR — SELECTIVE SERVICE SYSTEM

departments compete for the control of different types of subject matter. In time of war or military occupation of foreign countries, it is hard to draw sharp jurisdictional lines between the functions of the occupying military authorities and those of the Department of State. The Department of Justice, as the legal department of the government, sometimes clashes with the legal staffs of the other departments. The Department of the Interior, which by reclaiming arid lands brings new land into agricultural production, often clashes with the Department of Agriculture, which seeks to limit agricultural production sufficiently to maintain adequate returns to farmers. The jurisdictions of the Agriculture and Labor departments are likely to clash over such matters as the supervision of itinerant farm workers.

Departmentalization can also divide functions which are not properly divisible. The duplication, confusion, and inefficiency resulting from the separation of the army and the navy into two executive departments were so starkly demonstrated in two world wars that their recombination under a Department of Defense had to be attempted. With changing circumstances or changing conceptions of governmental organization, functions which fit imperfectly under the jurisdiction of one department may be transferred to another. The United States Public Health Service, for example, which had its origin within the Department of the Treasury, was shifted in 1939 to the Federal Security Agency. In 1949 President Truman attempted unsuccessfully to get it incorporated in a new Department of Welfare. The Bureau of Public Roads was established in the Department of Agriculture in 1893, transferred to the Federal Works Agency in 1939, and again to the Department of Commerce in 1949. The Bureau of Mines was established in the Department of the Interior in 1910, transferred to the Department of Commerce in 1925, and retransferred to the Department of the Interior in 1934. The Bureau of Immigration and Naturalization was established in the Treasury Department in 1891, transferred to the Department of Commerce and Labor in 1903, and as the Immigration and Naturalization Service was transferred to the Department of Justice in 1940. Dozens of agencies, indeed, have undergone some such experience.[2] The shifts reflect the attempts of the government to improve the symmetry of its classification of functions in the executive department.

The Formation of New Departments. Whether because of its desire to keep the cabinet small enough to serve as a workable body of presidential advisers, or because of difficulty in finding a pattern for integrating functions into new executive departments, Congress has been extremely slow in extending executive departmental status to new agencies. As new departments have been formed, they have ordinarily been built around functions transferred from existing departments. The first Congress which met after the adoption of the Constitution established the Department of State

2. For lists see the appendix to the most recent edition of the *United States Government Organization Manual.*

and the War and Treasury Departments, an Office of the Attorney General (forerunner of the Department of Justice), and a temporary Post Office Department. The Navy Department was established in 1798 to take over functions previously handled by the War Department. The Department of the Interior, established in 1849, took over various scattered functions, many of which had previously been lost in the Treasury Department. The Department of Agriculture picked up a few minor functions from other agencies but got its principal start as an independent agency created in 1862 and became an executive department in 1889. The Department of Commerce and Labor, established in 1903, brought together various older agencies, but was divided into the two Departments of Commerce and Labor in 1913. From that year until 1947 the number of executive departments stood at ten. Then a Department of the Air Force was created which, along with the Navy Department and the War Department, now renamed the Department of the Army, was to constitute the National Military Establishment over which a Secretary of Defense was to preside. When this arrangement failed to bring the desired coordination of the three military departments, Congress in 1949 created a new Department of Defense, headed by the Secretary of Defense, and deprived the three military departments of their status as executive departments, leaving the total number of executive departments at nine.

The formation of additional executive departments is being constantly proposed. Prominent among the suggested titles are Department of Welfare, Department of Education, Department of Education and Public Welfare, Department of Public Health, and Department of Public Works. In 1949, President Truman proposed a reorganization plan to establish a Department of Welfare. The proposal fell afoul of criticism based on plans for the expansion of federal health services and on other grounds, and was defeated by action of the Senate. In May, 1950, a revised plan called for a Department of Health, Education and Security. Like its predecessor it met with strong opposition from the medical fraternity, which opposed any strengthening of agencies which might encourage what it called socialized medicine. This plan also met legislative defeat. Scattered throughout the government are many agencies with various titles and serving various purposes — some of which will be discussed later — which might well be brought together in one or more new departments, but satisfactory arrangements remain to be made.

Departmental Organization. Each of the nine executive departments is headed by a member of the President's cabinet who bears the title of Secretary of his department, except that in the Department of Justice that official is called Attorney General and in the Post Office Department, Postmaster General. Each of the executive department heads receives a salary of $22,500. In most instances political party considerations have a great deal to do with the appointment of department heads. The appointee is likely to be a man in good standing in his party whose appointment will serve

in some sense as a political reward, and at the same time redound to the credit of the party. Sectional considerations also play their part. Further, most appointments take into account the fitness of men to head particular departments. The Secretary of State will be expected initially to know something of foreign affairs, and the Secretary of the Treasury to know something of finance. The Secretary of Agriculture is expected to have had a close connection with farming, and the Secretary of Labor must have been a worker himself or been known for his advocacy of the cause of labor. The Attorney General must, of course, be a lawyer. A kind of negative requirement is prescribed for the Secretary of Defense: he must not, during the preceding ten years, have been a commissioned officer in a regular component of the armed services. This requirement — waived by a special statute in the case of General George C. Marshall — is evidently intended to eliminate any bias which he might have acquired as an officer in one of the three military services. The requirement that he be appointed from civilian life may in part reflect the desire of Congress to keep the military subordinate to civil government. It has seemed to be only the Postmaster General of whom nothing was required except that he be a leading party politician. Even here President Truman made an exception by appointing a man who had come up through the postal ranks rather than by partisan achievement. In time of crisis the President may abandon considerations of party politics altogether and make selections from the opposing party, particularly if it seems desirable to achieve an appearance of bi-partisanship in administration. Examples are Roosevelt's selection of Henry L. Stimson and Frank Knox before our entry into World War II as heads of the War and Navy Departments.

The Work of Department Heads. Except on the rare occasions when promotion to a secretaryship is made from an inferior position in a department, the secretary begins his work without extensive knowledge of his department. He has relatively little time to get acquainted with his department and establish himself as an effective directing officer, for his tenure is likely to be brief. He seldom serves longer than the President who appoints him, for the next President will have his own political obligations and will want to construct his own official family. If the President who appoints him serves for two or more terms, the Secretary may survive throughout the entire period, but this is not likely. Of the department heads who served under Franklin D. Roosevelt, only the Secretary of the Interior and the Secretary of Labor served the entire period of approximately twelve years. Roosevelt had two Secretaries of State, two Secretaries of the Treasury, three Secretaries of War, four Attorneys General, two Postmasters General, four Secretaries of the Navy, four of Commerce, and two of Agriculture.

Since he lacks the time necessary for getting thoroughly acquainted with his department, the Secretary must adapt himself quickly to its machinery and accustom himself to its traditional behavior. He finds his department

already organized in a particular way. It is made up of people accustomed to doing particular kinds of work according to particular patterns. Complete reorganization and complete changes in personnel would encounter the highly skilled resistance of people with everything at stake who were fighting on their own ground. The political realities being what they are, the resisting department would be likely to outlast the Secretary who attempted fundamental changes. By and large, therefore, the Secretary must adapt himself to the department as he finds it. To be at all effective, he must be able to command the respect and confidence of his subordinates and to harmonize differences among contending factions. Depending on his capacity for leadership he can win loyalty, stir enthusiasm, and improve somewhat the performance of his department, or he can create resentment and dislike and see his organization bogged down in the intricacies of administrative routine. He can inspire and lead, but he cannot drive. He can work with the President and the heads of other departments to harmonize somewhat the work of all the departments, but he finds that his fellows are likewise to some extent the prisoners of the agencies they nominally command, and that all of them must yield to the momentum or inertia which characterize their departments.

Subordinate Leaders. Serving directly under each of the Secretaries is an Under Secretary — with the title varied in three instances to Deputy Postmaster General, Deputy Attorney General, and Deputy Secretary of Defense. The Under Secretary, like the Secretary himself, is appointed by and with the consent of the Senate. He receives a salary of $17,500. The office is relatively new in the federal government. In earlier discussions of the office there was talk of making it a permanent civil service position so that its occupant might be in position to keep the work of the department going in spite of the changes of departmental heads. The Under Secretary does act in lieu of his chief when the latter is absent, or when the office of Secretary is vacant, but his position is so strategic that it has to be kept subject to the changes in control of policy which take place with changing administrations. The duties of the Under Secretary vary from department to department, although he is always expected to relieve the Secretary by assuming part of the burden of general administration.

Beneath the Under Secretary in each department are varying numbers of assistant secretaries — except in the Department of Defense where exists a different situation which will be discussed elsewhere, and in the Post Office and the Justice Departments where they are called respectively Assistant Postmasters General and Assistant Attorneys General. The office of Assistant Secretary is much older in the government than that of Under Secretary. The assistant secretaries are also appointed by the President with the advice and consent of the Senate. The department head, if he is a man of standing within the administration, is likely to have a great deal to do with the selection. The duties of assistant secretaries vary from department to department. They are usually listed as heads of major

departmental divisions. They are surrounded by budget officers and other specialized administrative officers who help to shape the mechanism of each of the major departments. Beneath the assistant secretaries come officers such as bureau chiefs and others with a great variety of titles, each with a particular meaning within its own department, though perhaps not with the same meaning in other departments using the same title.

The arrangement of superior officers in the Department of Defense is similar to that of other departments, except that as a carry-over from the time of its independent status each of the three military departments has its own top officer who still carries the title of Secretary, even though his department is now merely a military and not an executive department, and even though he does not sit as a member of the President's cabinet. Below the level of Secretary the arrangement of officers in the three military departments follows roughly the pattern already discussed.

Working Units in the Departments. Each department is extensively broken down into divisions and subdivisions. Such a break-down, and the allocation of particular functions to particular units, is necessary to effective operation. The hierarchy of subdivision varies from department to department, and terminology is lamentably diverse. Divisions, offices, services, bureaus, sections, boards, and units are variously intermingled without common content. This diversity reflects the impossibility of precisely classifying purely human activities, but its confusion is to be deplored. The Commission on Organization of the Executive Branch of the Government, better known as the Hoover Commission, recommended the following as standard terminology for subdivisions:

Service	Division	Section
Bureau	Branch	Unit

In most situations the bureau would be the top working organization. The term service would be used only where a number of bureaus might be consolidated into one working group, or where an individual bureau was particularly large. No such arrangement, however, has yet been generally adopted. The Hoover Commissioin stressed the need for a clear line of command from the President through the department head and his subordinate officers all the way down to the smallest working unit — a matter which will be discussed more at length in another chapter. Instead of drawing some of the bureau chiefs from the permanent civil service and having others appointed by the President with Senate confirmation, the Commission sought to strengthen the governing hand of the department head by giving him the power to appoint these officers in charge of the top working units. Here again, however, long-standing traditions, working arrangements, and political interests in the work of particular bureaus stand in the way of drastic changes.

Departmental Integration. If departments were rearranged according to

the symmetrical pattern advocated by the Hoover Commission, the department head would have a great deal to do with the presidential selection of Under Secretaries and Assistant Secretaries. He and his subordinates would select the bureau chiefs to whom the working directions for departmental activities would be addressed. The department head would be given the power to organize and reorganize functions within his department as he saw fit. Congress would make appropriations, not to individual units within a department for performance of particular functions, but to the department as a whole for allocation by department officers.

Such symmetry is only partly achieved in any of the departments. With or without reason, Congress distrusts the vast aggregation of people in the several departments which spend vast sums under the supervision of the President's official family. With or without justification, Congress, with its own interests to serve, makes specific appropriations and oftentimes by statute allocates particular functions to particular agencies within a department instead of turning the money over to the department head and directing him to see that the functions are performed. In most departments some authority is conferred directly on the Secretary and some on units in his department. The Secretary of the Treasury, for example, has broad power with respect to national fiscal policy, yet Congress takes certain matters out of his jurisdiction by prescribing particular duties for the Bureau of Internal Revenue and the Bureau of Customs. The Secretary of Agriculture has a great deal of authority over his department, but Congress nevertheless limits his jurisdiction by conferring specific duties upon the Bureau of Animal Industry, the Forest Service, and the Farm Credit Administration. He is master in his own house, yet not completely so. Congress, as a kind of super-landlord, intervenes from point to point as if to remind him that he is not completely trusted, that his powers are limited, and that what he has could easily be taken away.

Although this congressional intervention with the work of particular units or departments is bad for organizational symmetry and shocking to the expert in public administration, its roots lie deep in the political system. As mentioned in the chapter on pressure groups, and as will be discussed more at length in a later chapter, Congress makes generous appropriations to the Corps of Army Engineers rather than to the Secretary of Defense or the Secretary of the Army, because the Corps of Engineers renders services which are important politically to individual members of Congress. If appropriations and control were allocated directly to the Secretary of the Army, who is presumably concerned primarily with military affairs and only incidentally with clearing rivers and harbors and building dams for irrigation, the services in question might be restricted. Specialized functions, such as the collection of revenue and the control of immigration, call for detailed regulations, and in making these effective Congress is likely to feel that it ought to deal with the operating administrative agency and not merely with the Secretary of the Treasury or the Attorney General.

These problems of the extent to which the department head controls

subordinate agencies within his department go deep into human psychology. They are not merely matters of the presence or absence of statutory regulation. The Federal Bureau of Investigation, an agency within the Department of Justice, provides an example. The Bureau was originally set up, not by statute, but by an order issued within the Department. It would seem, therefore, that the Attorney General would have full jurisdiction over its personnel and its functions, yet the prestige of the Bureau is so great not only with Congress but throughout the country that any Attorney General who attempted to remove the director of the Bureau or distribute its major functions to other divisions would be committing political suicide. In actual fact the Attorney General himself is oftentimes unable to get access to materials in the files of the FBI. So it is that the scope of authority and even the survival of units within departments depend oftentimes on publicity gained and on prestige generally. For this reason subordinate agencies concern themselves not merely, and sometimes hardly at all, with attempting to please departmental heads, but rather with seeking favor in the eyes of Congress or of the people. These political factors inject themselves to some extent into every executive department and make it difficult or impossible to enforce nicely symmetrical schemes of administration.

INTERDEPARTMENTAL COORDINATION

The Need for Coordination. It is necessary to have clearly defined administrative agencies to handle foreign affairs, prepare for and wage war, administer finances, process and deliver the mail, and perform the other major functions of the federal government which are not allocated to the several departments. Yet the functions of various departments overlap and intertwine like the roots of trees in a thickly grown forest. Cooperation among two or more departments is often necessary for the performance of particular tasks. The handling of mail, for example, is under the Post Office Department. Yet the Interstate Commerce Commission has jurisdiction over the interstate commerce through which mail is transported; air mail subsidies are arranged by the Civil Aeronautics Board; the Commerce Department is concerned with the promotion of both foreign and domestic commerce; the Department of State negotiates treaties which determine the extent and methods of delivering American mail abroad; and the prosecution of postal frauds falls to the Department of Justice. Illustrations of this kind could be multiplied endlessly. Departments do not operate in isolation but in close relation with one another.

Yet so vast is the government as a whole and so complicated the many problems that the necessary cooperation is often neglected, and rivalries develop among departments and other agencies having different policies. Failure of the War and Navy Departments to cooperate adequately, for example, was blamed in part for the scope of the American disaster when the Japanese attacked Pearl Harbor on December 7, 1941. The Depart-

ment of Defense, which is concerned with American defenses throughout the world, operates in many matters as the rival of the Department of State for the control of American foreign policy. Bitter rivalry existed for many years between the Forest Service of the Department of Agriculture, which was concerned with the retention and preservation of forests in national hands, and the General Land Office of the Department of the Interior, which was concerned with getting public land into private hands as speedily as possible. When in the New Deal period the top leaders of the Department of the Interior began to think of the function of that Department primarily in terms of conservation of natural resources and began to advocate a change in name to Department of Conservation, anxious people in the Department of Agriculture began to wonder which of their own functions and bureaus might be stolen away by the Department of the Interior.

Coordination at the Cabinet Level. In matters so important that the President himself can give time to them, he to some extent brings about the necessary coordination. The use of the Executive Office of the President for this purpose will be discussed in connection with the organization of that Office. In theory, the meetings of the Cabinet with the President ought to provide occasion not merely for discussion of board questions of policy, but also for defining the functions of rival departments in coping with special problems. Actually, the Cabinet meetings seldom accomplish much along this line. If the department heads have absorbed the departmental loyalties and the feelings of interdepartmental rivalry which characterize their subordinates — and they generally do — they may hesitate to disclose their plans to rival department heads before individually seeking the support of the President.

Nevertheless a great deal of coordination does take place at the Cabinet level. One device employed is that of Cabinet committees consisting of those department heads particularly interested in a given subject. For example, when in 1934 President Roosevelt was interested in getting under way with a social security program, he appointed a Cabinet committee to initiate the project. It consisted of the Secretary of Labor as chairman, the Secretary of Agriculture, the Secretary of the Treasury, and the Attorney General, with the later addition of Harry Hopkins as relief administrator. This committee did the spade work necessary to initiating a program which would affect the work of many departments but did not rightfully fall within the jurisdiction of any one department.[3] For integration of departmental programs relating to national security, Congress provided in the National Security Act of 1947 for a National Security Council consisting of the President, the Secretaries of State, Defense, the Army, the Navy, and the Air Force, and the chairman of the National Security Resources Board. Congress provided in the same act for a National Security Resources Board with a full-time chairman and other members consisting of the Secretaries

3. For discussion see Frances Perkins, *The Roosevelt I Knew* (Toronto: Macmillan, 1946), pp. 80ff.

of State, the Treasury, Defense, the Interior, Agriculture, Commerce, and Labor. Such agencies can do important work in shaping policy and in helping the several departments work together as a team. It may well be, however, as suggested by the Hoover Commission, that instead of having membership rigidly established by act of Congress, the President ought to have the exclusive power of selecting these groups from among his Cabinet subordinates.

Interdepartmental Committees. A great deal of interdepartmental coordinating has to be done below the Cabinet level. Witness the ramifications of State Department activities in matters of national defense, commerce, agriculture, labor, and other fields, and the extension of the activities of other fields into foreign affairs. The Hoover Commission noted that some forty-five non-State Department units were involved in some way in foreign affairs. Some thirty interdepartmental committees were found operating in this field. Such committees operate throughout the various areas of departmental overlapping. A study of interdepartmental committees of the New Deal period classifies them as exploratory committees, such as the Committee on Economic Security which paved the way for the social security program; functional coordinating committees such as the interdepartmental organization for negotiating agreements; and institutional coordinating committees, such as the Central Statistical Board which neither initiated programs nor merely coordinated the work of several departments, but rather sought to extract from the several departments and do in a single agency much of the statistical work which had hitherto been inadequately systematized.[4] If not properly watched, such committees themselves tend to overlap and to add to as well as solve the problems of achieving an over-all governmental purpose. They can become instruments of endless conversation without necessarily achieving interdepartmental understanding or coordination of effort. Whatever their limitations, however, they do perform important integrating functions.

Informal Cooperation. A great deal of informal cooperation among departments takes place by means less formal than permanent or even temporary interdepartmental committees. When good will and desire to cooperate prevail, as they often do, heads of departments, divisions, and bureaus communicate freely about the solution of common problems. Periodic conferences are arranged between representatives of two or more departments to iron out difficulties. An enormous amount of interdepartmental business is handled by the simple device of a telephone call. People in different departments who deal with common problems often know each other well enough to collaborate on an informal basis. Friendship does a great deal to facilitate collaboration. Agreements may be worked out by telephone without any formal record of decisions. If a formal record is

4. Mary T. Reynolds, *Interdepartmental Committees and the National Administration* (New York: Columbia University Press, 1939).

desired, a statement may be prepared for joint signature after agreement has been reached. A great deal of correspondence in departmental files consists of statements of agreement which have been worked out only after long periods of discussion and negotiation which the documents do not reveal.

THE INDEPENDENT REGULATORY COMMISSIONS

Nature and Functions. The nine executive departments discussed above are political agencies of administration which are broadly responsible to the President for what they do. Their highest ranking officers are selected partly in the light of political considerations. Legally, the President may remove such officers at any time with or without explaining his action; politically, of course, it may be unwise for him to do so.

In the nine agencies classified as independent regulatory commissions, however, the situation is quite different. The nine commissions bear the following names:

The Interstate Commerce Commission
The Federal Power Commission
The Federal Trade Commission
The Federal Maritime Board
The Civil Aeronautics Board
The Securities and Exchange Commission
The Federal Communications Commission
The Federal Reserve Board
The National Labor Relations Board.

These commissions are supposed to operate largely free of political considerations. They have evolved over a period of years since 1887, the date of the establishment of the Interstate Commerce Commission, as need has been felt for regulatory agencies which were not subject to political interference from the party which happened to be in control of the administration. The commissioners are appointed for definite terms of years which do not conform to presidential terms. The terms of individual commissioners are arranged so that they do not expire at the same time. Except on the National Labor Relations Board and the Board of Governors of the Federal Reserve System, not more than a bare majority of the particular commission can be of the same political party. Except from the Securities and Exchange Commission, the Federal Power Commission, and the Federal Communications Commission, board members cannot be removed by the President at will, but only under conditions specified by act of Congress.

The functions of the independent regulatory commissions include varying mixtures of rule-making, judicial action, and administration. More than the major departments, these bodies tend to merge legislative, executive, and judicial functions. In a sense they are little governments set up for the exercise of various kinds of governmental power with respect to particular subjects. The Interstate Commerce Commission, for example, has jurisdiction over railroads and certain other forms of transportation. The Federal Power Commission has jurisdiction over the interstate production

and transportation of electric power and natural gas. The Federal Trade Commission seeks out unfair trade practices, issues orders against them, and prosecutes the violators in the courts. The Federal Maritime Board has various regulatory duties in connection with ocean shipping. The Securities and Exchange Commission has jurisdiction over the sale of securities through the mail or in interstate commerce, the activities of holding companies across state lines, and related matters. The Federal Communications Commission has jurisdiction over telephone, telegraph, and radio. The Civil Aeronautics Board regulates interstate air travel. The Board of Governors of the Federal Reserve System has major jurisdiction over the national banking system. The National Labor Relations Board has jurisdiction over collective bargaining and related labor problems.

Conflicting Attitudes Toward the Commissions. Both in the federal government and in the several states which also employ agencies of this kind, much is said in support of the independent regulatory commission as a governing device. Ordinarily, the commission is expected to regulate some field of business, such as railroads, or some aspect of business practice, such as the advertising and sale of securities, in such a way as to protect the public against predatory business activities. Its independence is supposed to free it from some of the external pressures which might influence its conduct if commission members were subject to removal at any time or if the terms of all members expired at the same time. This attitude has seemed to be justified to some extent by the traditionally high standards of conduct long maintained by some of the commissions and particularly by the Interstate Commerce Commission. That body, indeed, has maintained a prestige which is hardly inferior to that of the federal courts, which maintain a tradition of a high degree of objectivity.

The giving of jurisdiction to independent regulatory commissions, on the other hand, is inconsistent with the thinking of those who hold that all administration ought to be subject to presidential control. If an independent commission has jurisdiction over an important field of enterprise, such as railroad transportation, it may hamper or defeat the President in the exercise of his own powers in related fields. Some contend, furthermore, that in spite of every effort to keep the commissions active and free from bias, they do from time to time require the stimulation and correction of presidential authority. It is said that they either bog down in their own routines or develop a bias on behalf of the private agencies which they are supposed to regulate. A policing commission, particularly one such as the Federal Trade Commission, which has no specific constituency to give it support and whose every act of policing tends to make it unpopular with the business regulated, is thought to be particularly prone to the blandishments of those businessmen who attempt to soothe or flatter it into inaction. It was for this reason, and not for any lack of administrative competence, that President Roosevelt early in the New Deal period attempted to remove William E. Humphrey from the Federal Trade Commission. The Presi-

dent found that Humphrey's ideas and his own were sharply different on the proper relations between business and the government. Unfortunately for Roosevelt's plan of achieving harmony, the Supreme Court held that he had no power to remove a commissioner for such a reason.[5] In 1948 the chairman of the Federal Trade Commission, Robert E. Freer, showed his lack of sympathy with the rest of the Commission by taking before a Senate committee the position that government regulation of business was worse than free competition even though such competition was often "ruinous, harsh, and brutal." [6]

In 1937, the President's Committee on Administrative Management, better known as the Brownlow Committee, which had been appointed to survey the entire executive branch of the government and recommend plans for reorganization, sharply criticized the independent commission device. The committee said:

> They are, in reality, miniature independent governments that have to deal with the railroad problem, the banking problem, or the radio problem. They constitute a headless "fourth branch" of the government, a haphazard deposit of irresponsible agencies and uncoordinated powers. They do violence to the basic theory of the American Constitution that there should be three major branches of the government and only three. The Congress has found no effective way of supervising them, they cannot be controlled by the President, and they are answerable to the courts only in respect to the legality of their activities.[7]

The committee declared further:

> It would be more accurate to call them "irresponsible" regulatory commissions, for they are areas of unaccountability.[8]

The committee recommended that the non-judicial functions of the several commissions be segregated and allocated to the appropriate executive departments. The purely judicial functions were to be carried on by quasi-judicial groups with little of the power to control policy which had hitherto been exercised by the commissions. President Roosevelt's presentation of these recommendations to Congress was met by a nation-wide protest against what was regarded as a political attack upon the commissions. Congress responded by protecting a considerable number of the commissions against the proposed reorganization. The Roosevelt administration, which had been responsible for the creation of a number of these bodies, thereafter created no more of them and it reduced to administrative units those which it was permitted to reorganize.

The agencies listed above continue to function as independent regulatory commissions largely free from presidential control, and the issue of dis-

5. *Rathbun (Humphrey's Executor)* v. *United States,* 295, U.S. 602 (1935).
6. Testimony before a Senate interstate commerce subcommittee reported in the *New York Herald Tribune,* June 3, 1948. See also "Let's Stop Kicking Business Around," by Lowell B. Mason in *The American Magazine,* vol. CXLI (May, 1948), pp. 21ff.
7. President's Committee on Administrative Management, *Report of Committee with Special Studies* (Washington: Government Printing Office, 1937), p. 39.
8. *Ibid.,* p. 40.

organized administration which they pose continues unresolved. The Hoover Commission, in 1949, showed much less concern about the problem than had been shown by the Brownlow Committee. It did recommend stripping certain purely administrative functions from them, vesting all administrative responsibility in the chairman of each commission, limiting the President's power to remove members from the three commissions over which he now has that power, making certain other internal changes, and increasing salaries. Congress authorized certain internal changes and raised salaries, fixing most of them at $15,000 a year. Since the Hoover Commission accepted the independent regulatory commissions pretty much as they are, Congress is not likely soon to make drastic changes in them.

GOVERNMENT CORPORATIONS

Nature and Functions. While independent regulatory commissions differ from executive departments in their almost complete lack of responsibility to the President and in their tendency to combine legislative, executive, and judicial powers, government corporations differ in still other ways. The corporation is a device brought into government from the business world to provide mechanisms for handling affairs which are more like those of private business than like the conventional activities of government. The United States became the owner of an important corporation shortly after the turn of the present century when it acquired the Panama Railroad Company along with other facilities necessary for construction of the Panama Canal. Since carrying on such an enterprise was different from the functions being performed by any of the executive departments, the government preserved the corporation as an entity and operated the railroad much as if it were privately owned. Additional corporations were formed within the government during the period of World War I, when the government found that in addition to waging military warfare it had to operate businesses and make loans to stimulate private business, for none of which existing departments were already equipped.

As the federal government withdrew from many of its business activities after that war, most of the corporations other than those connected with provision of agricultural credit were dissolved. During the New Deal period, however, as the government reached out in all directions to restore economic prosperity, large numbers of new corporations were formed. The government had retracted but little from business when World War II took it even more deeply into the management and control of economic activities. A committee of the House of Representatives found in 1948 that:

> There are 86 government corporations in existence at the present, the majority of which are engaged in business activities, including production, transportation, power, housing, insurance, and banking.[9]

9. *Government Corporations Appropriations Bill 1939,* House Report No. 1880, 80th Cong., 2d sess., p. 7.

A Hoover Commission task force report published in January, 1949, found a total of eighty-seven government corporations, of which twelve were in process of liquidation. Fifty-one of these were in what was called the Farm Credit Administration group. These included agencies of various kinds for the extension of agricultural credit. Another group included the powerful Reconstruction Finance Corporation and the Federal National Mortgage Association which is closely linked with it. Thirteen corporations were listed as in the housing and home finance group. Another group included the Commodity Credit Corporation and the Federal Crop Insurance Corporation, and still another included a diverse collection: The Inland Waterways Corporation, the Export-Import Bank of Washington, the Federal Deposit Insurance Corporation, Federal Prison Industries, Inc., the Panama Railroad Company, the Tennessee Valley Authority, and the Virgin Islands Company.[10] Government corporations handle tremendous sums of money. For the fiscal year ending June 30, 1947, expenditures of such corporations ran to more than seven billion dollars. For the fiscal year 1949 they were estimated at more than thirteen billion dollars. As of December 31, 1947, the total borrowing authority of government corporations stood at $29,500,000,000, of which nearly $12,000,000,000 had actually been borrowed.[11]

Appraisal of the Corporate Device. The aim of the government in using the corporation rather than ordinary departmental mechanisms is to provide for the handling of specialized business functions with the greatest possible efficiency. In handling the ordinary affairs of a government department, government officials merely spend money appropriated by Congress to do work which Congress has prescribed. The Department of State, in the handling of foreign affairs, does not earn money for which it must give an accounting. Its success as a government agency is not measured by the skill with which it handles capital sums. The Department of Justice does not demonstrate its worth by the fines which the government collects as the result of victories in some of its law suits. When an agency makes loans, however, such as the Reconstruction Finance Corporation, or when it manages vast quantities of income-producing property as does the Tennessee Valley Authority, then the quality of its performance is to be measured somewhat as the success of a business enterprise is measured, and its ability to manage such enterprises properly depends in part on its having the same flexibility of control over its capital as private corporations have. The problem of the federal government in connection with its own corporations, therefore, is that of giving them enough discretion to operate effectively as a private corporation would operate, without permitting them to get out of hand and misuse government property or operate programs which are out of line with the policy of the government generally.

10. *Revolving Funds and Business Enterprises of Government*, pp. 172–73.
11. *Government Corporations Appropriations Bill 1939*, House Report No. 1880, 80th Cong., 2d sess., pp. 4–5.

Growing concern about the expanding power of government corporations and about the looseness of control over them led to enactment of the Government Corporations Control Act of 1945, which required that all corporations owned wholly by the government should submit annual budgets to Congress. The statute also brought them under a commercial type of audit which was deemed better adapted to their form of activity than the audits to which government departments and other agencies are subjected. Enthusiasm for use of the corporate device has subsided a great deal for reasons which are explained in part as follows:

> A principal contributing factor in this development has been over-use of the corporate device. Instead of employing the corporate form only in clear-cut cases of public enterprises engaged in the conduct of financially self-supporting programs, corporate status has been conferred on a number of activities simply because they were going to do some buying or selling, or because they were administering an urgent program, or because their administrators wanted freedom from regular governmental controls, or because it was easier to get a new agency set up as a corporation under state incorporation laws than to secure action by Congress.[12]

The President's Committee on Administrative Management in 1937 was concerned about the extent to which the establishment of relatively autonomous government corporations interfered with the symmetry of control over executive activities under the ultimate direction of the President. It advocated in general the placement of government corporations within executive departments, even though they might be but loosely controlled by the departments in which they were lodged. A certain amount of shifting was done to provide at least the appearance of symmetry, with the result that in 1949 the Hoover Commission found only four corporations without departmental connections. They were the Reconstruction Finance Corporation, the Export-Import Bank, the Tennessee Valley Authority, and the Federal Deposit Insurance Corporation.[13] That Commission took no definite stand on the problem of genuine integration between corporations and departments, but among other things it did recommend the transfer of lending corporations to the jurisdiction of the Treasury Department so as to eliminate confusion in the financial policy of the government.[14] Some of the corporations which are connected with departments are subject to but little departmental control, whereas others are controlled virtually as departmental bureaus. The rightful extent of the use of government corporations remains to be discovered. More attention needs to be paid to the selection and use of their boards of directors, to their relations with Congress, to their coordination or lack of coordination, and to their relations with existing departments. At present, whatever their defects, they seem a useful device. It may be, however, that as regular government agencies become

12. C. Herman Pritchett. "The Government Corporation Control Act of 1945," *American Political Review,* vol. XL (June, 1946), pp. 494–96.
13. *Federal Business Enterprises,* p. 78.
14. See Marshall E. Dimock, "Government Corporations: a Focus of Policy and Administration, II," *American Political Science Review,* vol. XLIII (December, 1949), p. 1147.

gradually accustomed to the management of business projects, techniques will be worked out which will make the extensive use of corporations unnecessary.

OTHER ADMINISTRATIVE AGENCIES

In addition to executive departments, independent regulatory commissions, and government corporations, large numbers of other agencies with varying titles are scattered through the executive branch of the government. Their existence has varied explanations. Often, such an agency is created when a task needs to be performed which does not fit into the pattern of one of the established departments or which, it is feared, will not be well performed by an established agency because of a prevailing departmental attitude toward the function. These scattered agencies vary tremendously in size, ranging in November, 1949, from the Indian Claims Commission which had eleven employees to the Veterans' Administration which had nearly 196,000. Various non-departmental agencies have more employees than does the Department of Labor, the smallest of the executive departments, which on the date in question had just over 5,000. There are times, indeed, when a so-called independent agency seems to perform a much more vital part in the life of the country than do some of the executive departments. The Atomic Energy Commission, with its close to 5,000 employees, may well perform services more vital than those of the Department of Commerce with its more than 47,000. To the extent to which number of employees is important, account must be taken of the fact that the Federal Security Agency has just under 35,000, the General Services Administration has just under 24,000, and the Panama Canal has over 21,000. The Department of State, on the other hand, which next to the Department of Labor is the smallest of the executive departments, has just over 22,000.[15]

From the point of view of administrative efficiency it would seem desirable that these scattered agencies, which have no departmental status and which do not therefore have access to the President through a department head, should be organized into departments already established or brought together in new departments to enable the President to supervise and integrate them more adequately. The task of bringing diverse organizations together in unified organizations and under unified leadership is constantly in process. So also, however, is the task of creating new agencies for the performance of new functions. Complete symmetry will remain an ideal incompletely realized as long as society continues in process of change. It often happens that new agencies and new functions must be operated independently for considerable periods before places can be found for them in larger establishments. Some of them, furthermore, prove virtually indigestible and have to be continued in their independent status. Practically speaking, therefore, in addition to the major departments, the inde-

15. For these various figures see *Congressional Record*, January 24, 1950, vol. 96, part 1, pp. 791–99.

pendent regulatory commissions, and the government corporations, there are always likely to be considerable numbers of diverse agencies scattered throughout the government for performance of diverse functions which are important but which for one reason or another do not fit well into any established pattern of major departmental organization.

PRESIDENTIAL CONTROL

The Focus of Authority. Over this vast assembly of diverse organizations, the President exercises such authority as is permitted by the Constitution and federal statutes and as is possible in the limited time available. Federal statutes limit his power in various fields, it is true, but the limitations do not necessarily lighten his problems. With respect to the independent regulatory commissions, for example, his power is limited primarily to making appointments and to recommending appropriations. If these commissions get in the way of his exercising power through the executive departments or other agencies, they may add to the difficulty of his task. In similar fashion, his problems are complicated rather than simplified when Congress lays responsibilities directly upon agencies within executive departments rather than upon the President himself, since such action limits his control over personnel and machinery nominally operating under his direction.

The scope of the President's responsibilities is indicated by the following quotation from the first report of the Hoover Commission.

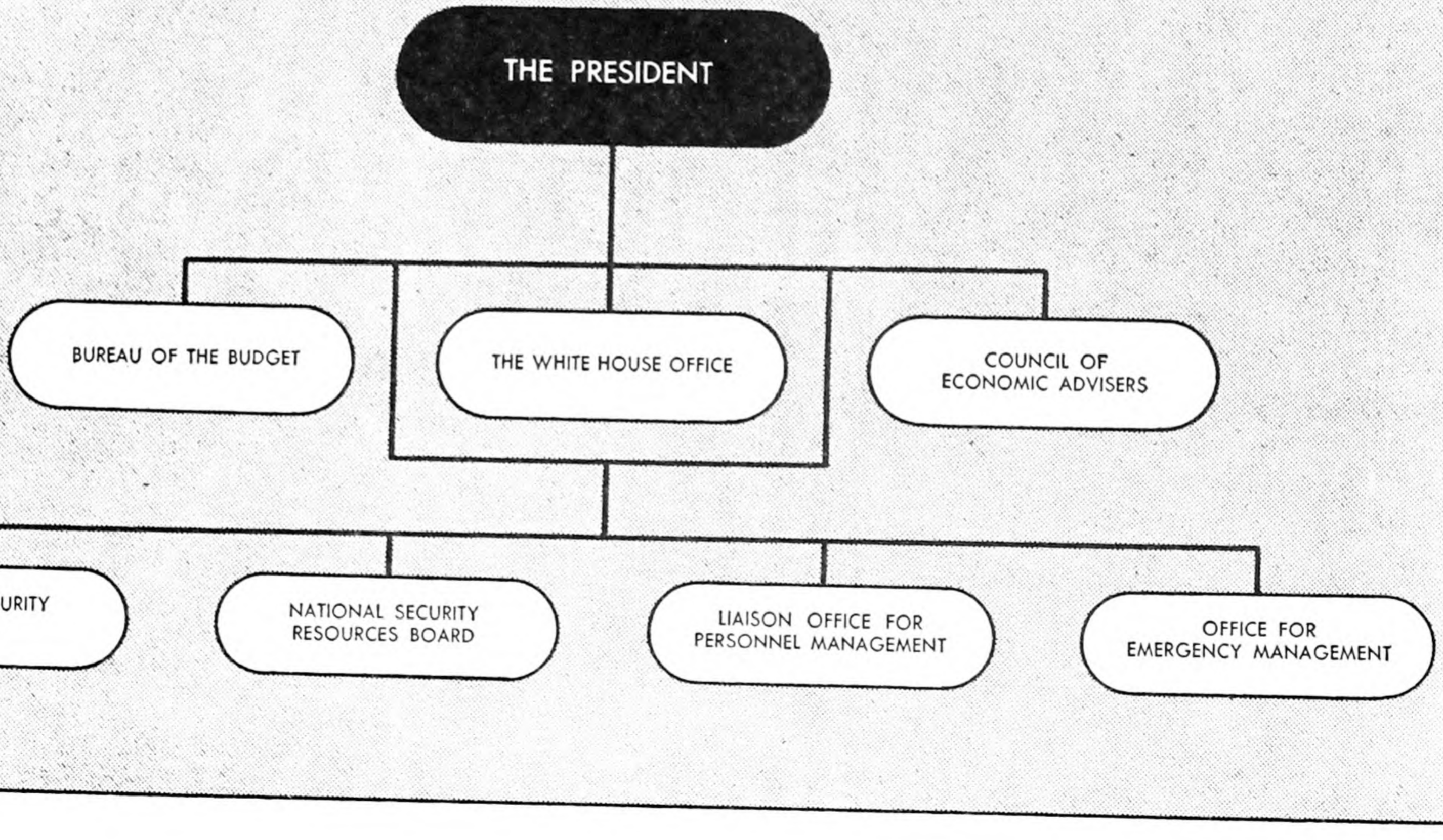
> At the present time there are 65 departments, administrations, agencies, boards, and commissions engaged in executive work, all of which report directly to the President — if they report to anyone. This number does not include the "independent" regulatory agencies in their quasi-judicial or quasi-legislative functions. It is manifestly impossible for the President to give adequate supervision to so many agencies. Even one hour a week devoted to each of them would require a 65-hour work week for the President, to say nothing of the time he must devote to his great duties in developing and directing major policies as his constitutional obligations require.[16]

To make possible more adequate supervision, the Commission recommended the grouping of large numbers of scattered agencies into departments so as to reduce the agencies at least nominally reporting directly to the President to about one-third the present number.

The Executive Office of the President. No amount of reorganization among the operating agencies of the government would in itself be sufficient to enable the President to exercise adequate authority. What is called staff assistance must be provided at the President's elbow. No President has in himself the energy or the mental equipment to comprehend and appraise the workings of the total establishment which he commands. He cannot in himself work out policy for the conduct of foreign affairs and then watch carefully the implementation of that policy in the Department

16. *Organization of the Executive Branch of the Government*, pp. 35–36.

EXECUTIVE OFFICE OF THE PRESIDENT



of State and the cooperation or conflict between the State Department, the Department of Defense, and various other agencies. He cannot think out an agricultural policy and then keep close track of its administration by the Department of Agriculture and the various lending agencies, and of interrelations with the Department of the Interior, the Department of Commerce, the Department of Justice, and other interested bodies. He cannot himself work out and persuade Congress to accept intricate financial policies and then watch in detail the operations of the vast number of government financial agencies with which that program is involved.

Until within the present century the President relied largely upon the executive departments or personnel borrowed from them, or upon informal advisers, for such personal assistance as he needed. So great, however, has become the need for men around him who can hear and see and think and plan with respect to the problems inviting presidential attention that an official agency known as the Executive Office of the President has been established for that purpose. Within that agency are grouped

The White House Office
The Bureau of the Budget
The Council of Economic Advisers
The National Security Council
The National Security Resources Board.

These agencies are instruments of management to be used by the President in directing the vast establishment which operates at least nominally under his command. They are not operating agencies in the sense in which the Post Office Department provides for the carrying of the mail, the Department of Agriculture promotes the welfare of agricultural interests, and the Department of Defense prepares for and perhaps wages war. They are facilitating agencies of management. Each of them calls for some independent discussion.

The White House Office. The White House Office includes the secretarial staff that for a considerable time has been building itself around the position of the President. For a good many years members of this group have maintained contacts with members of Congress, with the heads and other important officers of executive departments and agencies, and with the press, the radio, and the general public. An efficient organization has been developed to handle the stream of correspondence and documents which flows through the executive office. On the recommendation of the President's Committee on Administrative Management in 1937, the appointment of six administrative assistants to serve at the beck and call of the President was authorized. In its desire to make these assistants genuinely the servants of the President, the committee stated the ideal that they should have "a passion for anonymity," in contrast with most able and ambitious employees who seek publicity with an eye to their advancement. The turn-over in these offices has been high. Some of the incumbents have demonstrated less passion for anonymity than might well be desired, and have used their positions as stepping-stones to desirable advancement. Even so, the attempt

to equip the President with able personnel to aid in administration without loading these officials down with departmental responsibilities of their own has done something toward helping the President to keep the gigantic executive establishment under control.

The Bureau of the Budget. The Bureau of the Budget, established pursuant to the Budget and Accounting Act of 1921, is an important agency within the Executive Office of the President. Its purely budgetary functions will be discussed more at length in another chapter. Its importance here derives largely from the fact that by controlling the budget requests which an agency can make to Congress and also by keeping a check on expenditures for which appropriations have been made, the bureau is in position to exercise great restraining influence over the many executive agencies. It is peculiarly the presidential watch dog for keeping the administrative lambs within the sheepfold. Although it lacks the personnel and facilities for watching administration in full detail, it succeeds in making itself felt throughout the entire establishment. Furthermore, when Congress places in the hands of the President power to make the periodic reorganizations of government which have to be made, the Bureau of the Budget almost automatically becomes the instrument which he uses for this purpose. Apart from the President himself, therefore, the bureau constitutes in a sense the most powerful supervising agency of the executive branch of the government.

The Council of Economic Advisers. The Council of Economic Advisers was provided for by the Employment Act of 1946, the enactment of which was described in an earlier chapter. The Council is not an administrative agency and it has no power over administrative agencies such as that exercised by the Bureau of the Budget. It has the function, however, of making reports to the President on the economic state of the nation and the current relations of government policy to the economy. On the basis of its reports, the President transmits his own reports to Congress, where they are received and considered by a Joint Committee on the Economic Report. It is assumed that the information contained and the recommendations made therein will influence financial legislation and administration. Reactions to the economic reports may affect decisions whether to raise or lower taxes and in what brackets, whether steps should be taken to contract or expand currency and credit, whether government should support prices in particular fields to keep them from falling below particular levels or whether price ceilings should be set, whether government should engage in construction of public works and, if so, of what kind and to what extent. These and other types of decisions which may be involved affect the activities of government agencies in the fields of finance, commerce, agriculture, labor, and so on. Such decisions may affect foreign trade and relations with other countries and so, in the long run, affect even the activities of the military agencies of the government.

The National Security Council. The National Security Council, mentioned earlier in this chapter, was organized to bring together under the leadership of the President the heads of the several agencies having to do with the conduct of foreign affairs and with national defense and war, for the purpose of integrating policy in those fields. Like most agencies consisting of officers whose primary duties lie elsewhere, the extent and quality of the Council's performance are to be measured largely by the performance of a full time executive secretary. That officer, if sufficiently competent, can himself become the focal point for integrating decisions within this field. As stated by the executive secretary:

> The duties of the Council are to assess and appraise the objectives, commitments, and risks of the United States in relation to our actual and potential military power, in the interests of national security, for the purpose of making recommendations to the President; and to consider policies on matters of common interest to the departments and agencies of the government concerned with the national security, and to make recommendations to the President.[17]

The National Security Resources Board. The National Security Resources Board is another cabinet agency which attempts to centralize planning in certain important fields. Its concern is with the evolution of programs for mobilization of all the resources of the country, both human and natural, in the event of future war. Its function is to make such studies and plans as will eliminate at the beginnings of future wars the confusion and delay which have prevented efficient action at the time of our involvement in earlier wars.

The Hoover Commission recommended strengthening of the Executive Office of the President and improving its flexibility. It criticized, for example, the arrangement whereby the personnel of the National Security Council and the National Security Resources Board are fixed by statute. It argued that the President should be permitted to choose his staff personnel within certain limits, and that he should not be prevented by statute from reorganizing the President's office and from transferring functions and personnel from one part of it to another. It argued that the head of each staff agency in the President's office should be appointed by the President without confirmation by the Senate, except for the chairman of the Civil Service Commission, whom it wished to bring in as an adviser to the President on personnel matters. In May, 1950, President Truman issued a reorganization order centralizing the powers of the National Security Resources Board by vesting them in the chairman rather than in the department-head members.

ADMINISTRATIVE REORGANIZATION

Reorganization as a Perennial Problem. The problems with which executive departments and agencies deal are never static. Particular problems are constantly increasing or dwindling in importance or changing in

17. *United States Government Organization Manual,* 1949, p. 60.

character. New problems in each field are constantly arising. Because of these changes in the character of the problems and because nothing human and alive is ever static, government agencies themselves are in constant process of change. There is, of course, truth in the accusation that they often change too slowly, that they bog down in their own routines, and that they prove incompetent to face their problems in proper perspective. Both the fact that they are constantly changing and that they often fail to change enough or in the right direction, bear upon problems of reorganization. If the Department of State, wrapped up in diplomatic routines and matters of protocol, fails adequately to look out for American business and agricultural interests abroad, more aggressive Departments of Commerce and Agriculture may find ways of moving into the field of the conduct of foreign affairs in competition with the Department of State. The consequent overlapping may bring conflict and confusion in spite of interdepartmental negotiations. It may be necessary — as in this instance — to reorganize the departments involved so as to reassemble the control of this function in a single department in the hope that it will there be better performed.

A governmental function which was once highly important may have dwindled in its comparative importance so that, whereas once its administration by an independent agency or by an elaborately staffed bureau was justified, it ought now to be merged with the functions of some other department or lesser agency. No agency likes to be cut in size or importance, and the change may have to be forced upon it. Again, it may be discovered that some practice, such as that of sending out questionnaires to accumulate information from businessmen, is being carried on by so many agencies for so many purposes that the task of answering the questionnaires proves enormously burdensome and brings indignant protests. There may be need for the checking of questionnaires one against another to discover the extent to which they are asking for duplicate information. It may prove desirable from an over-all point of view to bring about centralized supervision of all statistical inquiries. Yet no inquiring agency yields readily to such supervision. The requirements may have to be enforced by some agency having superior jurisdiction.

The need for extensive reorganization sometimes comes about as an adjustment to a crisis such as a major war or a depression, or for the purpose of either consolidating or abandoning changes in governmental machinery which the crisis has brought about. Drastic reorganization was called for both during and after World War I and World War II and the depression of the early 1930's.

Methods of Reorganization. Since the executive departments and the more important independent agencies are established by acts of Congress and are subject to modification by Congress, Congress might be expected from time to time to realign administrative agencies for more efficient performance. There are, however, unfortunate impediments to such con-

gressional action. Problems of organization are highly technical. A great deal of detailed knowledge is necessary for sound decisions. There is no such public understanding of organizational problems as to create public insistence that the task of reorganization be performed as it should. On the other hand, every combination of agencies, every shift of agencies, and particularly every abolition of agencies antagonizes some group of government employees, all of whom have political friends in Washington or back home to urge individual congressmen to oppose particular changes. Almost all members of Congress are in favor of reorganization generally in the interest of efficiency and economy but, as a result of prodding from their constituents, they tend to make so many exceptions that thorough reorganization handled exclusively by Congress has in the past proved virtually impossible.

A more workable pattern was established during World War I when, for war purposes, Congress authorized the President to shift agencies and functions about as it seemed to him necessary. After the war, jealous of the accumulation of presidential power, Congress struggled vainly — apart from the creation of new agencies as under the Budget and Accounting Act of 1921 — with the task of reorganizing the machinery of the executive branch.[18]

Early in 1932, driven by the depression to seek greater economy in government, Congress granted President Hoover's request for a statute authorizing him to reorganize existing government agencies subject to a veto by Congress within a limited time. The House of Representatives, which was then controlled by Democrats, insisted that a single house have the right by concurrent resolution to defeat any reorganization plan submitted by the President. The Bureau of the Budget, under authorization from the President, worked out a series of adjustments among governmental agencies which were then submitted to Congress. By that time it was known that a Democratic President was about to enter the White House. The Democratic House, preferring to put all powers of reorganization in the hands of the new President, defeated the proposals submitted by President Hoover.

In the New Deal period new reorganization measures were passed giving power to the President to make changes which were subject not to defeat by a single house but by concurrent resolution of the two houses of Congress. Under this legislation, President Roosevelt made a number of agency shifts. As a part of the New Deal program, however, he brought about the establishment of a tremendous number of new agencies and the addition of new governmental functions. By the end of his first administration, the executive branch represented a vast area of disorganization and confusion. President Roosevelt appointed a Committee on Administrative Management, the Brownlow Committee mentioned above, which made recommendations for new legislation and new and more drastic shifts in govern-

18. For discussion see Carl B. Swisher, *American Constitutional Development* (Boston: Houghton Mifflin, 1943), Chapter 30. See also Lloyd M. Short, "Adjusting the Departmental System," *American Political Science Review*, vol. XLI (February, 1947), pp. 48–57.

mental organization.[19] Because it distrusted the sweep of presidential power exercised by President Roosevelt, Congress was slow to act, but in 1939 it passed a new reorganization measure which contained, however, numerous safeguards against the excessive exercise of presidential power. Pursuant to that act, a series of reorganization plans were issued to bring about the establishment of order in the executive branch. Many of the new and scattered agencies were abolished, merged into the major departments, or brought together in groups as independent establishments.

The major shifts planned by the Roosevelt administration under the 1939 reorganization act were brought about before the act expired in 1941, but by that time the functions of old agencies were being expanded or modified and new agencies were being created as part of a national defense program. When in December, 1941, the United States became a direct participant in World War II, Congress virtually reenacted for the period of the war the reorganization measure which had given emergency powers to President Wilson. In 1945, again sensing the need for drastic readjustments as soon as the war came to an end, Congress passed a new reorganization act running until April 1, 1948, under which the President was authorized to engage in reorganization subject to restrictions similar to those included in the earlier statutes. Before the expiration of that measure, President Truman submitted a number of reorganization proposals of which Congress accepted some and rejected others. In addition, Congress by statute brought about the loose merger of the Departments of the Army, the Navy, and the Air Force in what was called the National Military Establishment.

The Hoover Commission. For various reasons Congress was dissatisfied with the pattern of reorganization as worked out in the first Truman administration. President Truman lacked for a time, even within his own party, the prestige necessary to exercising a free hand in making governmental changes. Furthermore, 1947 and 1948 saw a Republican Congress which hoped to leave its own imprint on governmental reorganization. The reorganization devices used in the several statutes enacted since the early 1930's had been in large part those selected by Democrats. The Bureau of the Budget, the principal instrument used for working out reorganization plans, was supposed to be imbued with Democratic sentiments. The Republican Congress therefore established its own mechanism for planning reorganization by a statute enacted in the summer of 1947. It provided for a commission of twelve members[20] to survey the executive branch of the govern-

19. President's Committee on Administrative Management, *Report of Committee with Special Studies* (1937).

20. The twelve positions were equally divided between Republicans and Democrats. They were also divided equally between persons in public and private life. Of the six public members, two were appointed from the Senate, two from the House, and two from the executive branch. The privilege of making appointments was divided equally among the President, the President Pro Tempore of the Senate, and the Speaker of the House. Various other safeguards were included to provide for what was regarded as a desirable balance. For discussion see Ferrel Heady, "A New Approach to Federal Executive Organization," *American Political Science Review*, vol. XLI (December, 1947), pp. 1118–25. The members of the Commission were Herbert Hoover, Chairman;

ment and to report plans for such reorganization as was deemed necessary. From among the members appointed, the Commission selected Herbert Hoover as its chairman, thereby giving to the Commission on Organization of the Executive Branch of the Government its informal name.

With ample funds to spend on research, the Hoover Commission employed twenty-three so-called task forces to survey various segments of the executive branch. These task forces made reports to the Commission, which in turn wrote its own series of reports to Congress.[21] While the investigation was in progress, Democrats recaptured control of Congress and a Democratic President was re-elected. It was feared for a time that, because of partisan considerations, the work of the Hoover Commission would be largely lost. Chairman Hoover attempted to eliminate party considerations, however, and President Truman gave the Commission full backing. The

Dean Acheson, Vice-Chairman; Arthur S. Flemming; James Forrestal; George H. Mead; George D. Aiken; Joseph P. Kennedy; John L. McClellan; James K. Pollock; Clarence J. Brown; Carter Manasco; and James H. Rowe, Jr.

21. For accounts of the operations of the Hoover Commission, see Charles Aikin, "Task Force Methodology," *Public Administration Review*, vol. IX (Autumn, 1949), pp. 241–51, and Ferrel Heady, "The Operation of a Mixed Commission," *American Political Science Review*, vol. XLIII (October, 1949), pp. 940–52.

The Hoover Commission made its report in the form of eighteen separate documents along with some, but not all, of the task force reports as supporting documents. In addition to their independent publication, the eighteen Hoover Commission reports were reprinted by the House of Representatives as House documents of the Eightieth Congress, First Session. The list is as follows:

1. General Management of Executive Branch, H. Doc. No. 55
2. Personnel Management, H. Doc. No. 63
3. Office of General Services, H. Doc. No. 73
4. The Post Office, H. Doc. No. 76
5. Foreign Affairs, H. Doc. No. 79
6. Department of Agriculture, H. Doc. No. 80
7. Budgeting and Accounting, H. Doc. No. 84
8. National Security Organization, H. Doc. No. 86
9. Veterans' Affairs, H. Doc. No. 92
10. Department of Commerce, H. Doc. No. 100
11. Treasury Department, H. Doc. No. 115
12. Regulatory Commissions, H. Doc. No. 116
13. Department of Labor, H. Doc. No. 119
14. Department of the Interior, H. Doc. No. 122
15. Social Security, Education, and Indian Affairs, H. Doc. No. 129
16. Medical Activities, H. Doc. No. 128
17. Federal Business Enterprises, H. Doc. No. 152
18. Part 1. Overseas Administration, H. Doc. No. 140
    Part 2. Federal-State Relations, H. Doc. No. 140
    Part 3. Federal Research, H. Doc. No. 140

In addition, the Commission published a concluding report which appeared as House Document No. 197. The various documents, whether or not published, were listed or at least enumerated in *Progress on Hoover Commission Recommendations,* Senate Report No. 1158, 81st Cong., 1st sess., p. 2. The same volume incorporates a great deal of information about comments made and action taken on Hoover Commission recommendations during the year 1949. For a summary of congressional action on recommendations during the year 1949. For summaries of congressional action on reorganization plans, see *Congressional Record* (temporary daily edition), May 23, 1950, p. 7596, August 23, 1950, p. 13412, and September 14, 1950, pp. A6856–61.

several reports were submitted to the Speaker of the House of Representatives early in 1949.[22]

Commission Recommendations. The Commission recommended a long list of adjustments within the executive branch to eliminate duplication and conflict, to bring about smoother operations, give the President more adequate control over administrative agencies, and in general promote efficiency and economy in government. Some of the proposed steps have already been discussed, and others will be discussed in later chapters. The pattern of reorganization proposed by the Hoover Commission did not differ greatly from the pattern of the Brownlow Committee or from suggestions made throughout the years by experts on government organization. It reflected deep concern about the problems of adjusting managerial techniques to the growth in size of the federal government and to the changing problems of the government. It reflected concern about the cost of operating the gigantic federal establishment.

> It is almost impossible to comprehend the organization and management problems of the Federal Government unless one has some concept of its hugeness and complexity. The sheer size, complexity and geographical diversion of its operations almost stagger the imagination. As a result of depression, war, new needs for defense, and our greater responsibilities abroad, the Federal Government has become the largest enterprise on earth. In less than 20 years its civil employment has increased from 570,000 to over 2,000,000. Its bureaus, sections, and units have increased four-fold to over 1,800. Annual expenditures have soared from $3 billion to over $42 billion. It now costs more each year to pay the interest on the national debt than it did to pay the total cost of the federal government 16 years ago.
>
> Only 10 percent of the over 2,000,000 Federal employees are located in Washington; the balance are in the Field Service. In September, 1948, more Federal civilian employees were working outside the continental limits of the United States than in the city of Washington. The Federal Government of today is markedly different from the Government of 20 years ago. It is a government almost 4 times larger in terms of agencies and employees and 12 times larger in terms of expenditures. Such rapid growth could not take place without creating serious problems of organization and management. Methods, procedures, and controls effective two decades ago cannot cope with the management needs of today.[23]

The Limits of Organizational Remedies. The Hoover Commission concerned itself primarily with the problem of how the executive branch was

22. Among the various articles containing professional discussion of the several reports of the Hoover Commission, see "The Hoover Commission: A Symposium," prepared under the editorship of Louis W. Koenig with articles by Charles Aikin, Ferrel Heady, John M. Gaus, John D. Millet, D. S. Cheever, H. F. Haviland, C. Herman Pritchett, and Lewis B. Sims, *American Political Science Review*, vol. XLIII (October, 1949), pp. 922–1000; C. Homer Durham, "An Appraisal of the Hoover Commission Approach to Administrative Reorganization in the National Government," *Western Political Quarterly* (December, 1949), pp. 615–23; Clinton L. Rossiter, "The Constitutional Significance of the Executive Office of the President," *American Political Science Review,* vol. XLIII (December, 1949), pp. 1206–17; and John D. Millet, "Post-War Trends in Public Administration in the United States," *Journal of Politics,* vol. 11 (November, 1949), pp. 736–47.

23. *Concluding Report,* pp. 3–4.

to get its work done, and not with the scope and the kind of work which the government generally ought to do. It did not concern itself with the problems of necessary restraint of the executive branch by the legislative and judicial branches, except insofar as it attempted to show that certain existing legislative restraints upon administrative agencies get in the way of administrative efficiency. It has been said that

> The Hoover Commission reports are *not* available material for a rousing defense and discussion of *how* government can be made responsible in the age of dictatorship and democracy's decline. *The Federalist* represents a true "over-all" approach to the study of government. The Commission reports seem, in the main, to exhibit concern only for economy and efficiency in an imaginary world where propaganda, power politics, selfish motives, human frailties, are non-existent; or where these facts of political life lie prostrate before the Gods of authority, chain of command, economy, order, and efficiency — with the word "responsibility" thrown in. But to say, "Lord, Lord" is not to enter the kingdom! Neither does incantation of "responsibility, responsibility, democracy, democracy" insure those aims — witness certain splendid articles of the Soviet Constitution.[24]

The almost exclusive concern of the Hoover Commission for administrative effectiveness is partly explained by the directions given to the Commission and by the personnel makeup of the Commission and its task forces. It was directed to concern itself with those considerations and not with development of a well-rounded theory of American government. Its chairman was a former President who knew from his own experience the frustration which flows from poorly coordinated administrative machinery and from congressional restraint upon the executive. Furthermore, the task force reports on which in part the Commission reports were based, were written in many instances by men trained primarily in terms of the dogmas and techniques of public administration rather than in terms of the problems of democratic government as a whole. During the war or at other times many of them had been employed within the executive branch and had accepted the point of view there prevalent that increased authority should be vested in the executive and restraints from the other branches should be minimized.

An additional factor helped explain the current trend toward the advancement of executive power in times of national crisis. In such periods concern about sound principles of government generally, and about long-range effects of governmental policies and techniques, gives way to preoccupation with immediate problems. Men in positions of responsibility, and those who equip them with ideas, are not likely to brood deeply over proper relations between Congress and the executive branch when a major task of the federal government is to prepare for the eventuality, and at the same time try to prevent the eventuality, that enemy bombs may soon be exploding upon American cities and industries. In other words, our thinking is conditioned by emergencies rather than by our conceptions of democratic problems in the ultimate future. Under such circumstances,

24. C. Homer Durham, *op. cit.*, p. 620.

emphasis is almost always upon additions to executive power and improvement of its exercise rather than upon democratic restraint.

Differing Patterns of Reorganization. There is, as has been said, no ideal pattern of organization or reorganization for all times and circumstances. The correct pattern for war is not necessarily the correct pattern for peace. The pattern for prosperity may not at all be adequate for depression. A program of international cooperation may require vastly different organization from one patterned for isolation. Flexibility is therefore a prime desideratum. Yet there must be stability as well as change. Establishment of new governmental machinery and new routines of operation may be a costly and time-consuming venture. We cannot afford to dissolve existing structures overnight just because of major changes in our national goals. Permanent machinery must be kept in operation to perform the great variety of functions which must go on whether in peace or war, prosperity or depression, with such adjustments as are necessary to meet changing situations. There is need, in other words, for a permanent core of stable organization and behavior. In times past that core has been provided largely by the major departments and by various independent agencies which continue to operate pretty much as usual in spite of changes in circumstances.

When doing absolutely new things is involved, whether in war or depression or under other circumstances, it may be advisable to establish new agencies so that new functions will not be molded by routines unfitted to them. Such has been our practice on many occasions. Much of the machinery of World War II, as far as the performance of new functions was concerned, was brand new machinery. Much of that machinery was abandoned when the war had come to an end, although after this and other crises some attempts have been made to perpetuate machinery and methodology for use in future similar crises. Various agencies within the federal government today are attempting to cope in advance with problems which were handled badly in other crises because machinery was not available and techniques were not known. Along with stability and uniformity, therefore, must go a kind of governmental creativeness which can not be broadly planned in advance, and for which no adequate blueprint can ever exist. In administration as in legislation and in the judicial field, performance calls for a constant intermingling of the old and the new. Both are indispensable.

References

F. F. Blachly and M. E. Oatman, *Federal Regulatory Action and Control* (Brookings, 1940).

Robert E. Cushman, *The Independent Regulatory Commissions* (Oxford University Press, 1941).

Herbert Emmerich, *Essays on Federal Reorganization* (University of Alabama Press, 1950).

Frank Gervasi, *Big Government, The Meaning and Purpose of the Hoover Commission Report* (McGraw-Hill, 1949).
George A. Graham and Henry Reining, *Regulatory Administration* (Wiley, 1943).
Luther Gulick and L. Urwick, *Papers on the Science of Administration* (Institute of Public Administration, reprint, 1947).
Avery Leiserson, *Administrative Regulation; A Study in Representation of Interests* (University of Chicago Press, 1942).
Carl McFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission* 1920–1930 (Harvard University Press, 1933).
John D. Millett, *The Process and Organization of Government Planning* (Columbia University Press, 1947).
Fritz Morstein Marx, *The President and His Staff Services* (Public Administration Services, 1947).
President's Committee on Administrative Management, *Administrative Management in the Government of the United States,* Report, 1937 (Public Administration Services, reprint, 1947).
Mary T. Reynolds, *Interdepartmental Committees in the National Administration* (Columbia University Press, 1939).
I. L. Sharfman, *The Interstate Commerce Commission,* 5 vols. (Commonwealth Fund, 1936).
Herman Miles Somers, *Presidential Agency, The Office of War Mobilization and Conversion* (Harvard University Press, 1950).
Henry L. Stimson and McGeorge Bundy, *On Active Service: In Peace and War* (Harpers, 1948).
United States Commission on Organization of the Executive Branch of the Government, *The Hoover Commission Report on the Organization of the Executive Branch of the Government* (McGraw-Hill, 1949).
Schuyler C. Wallace, *Federal Departmentalization* (Columbia University Press, 1941).
George Warren (ed.), *The Federal Administrative Procedure Act and the Administrative Agencies* (New York University School of Law, 1947).

17

Administrative Manpower

Although the efficiency of government depends in part on the adequacy of its departmental groupings, it must not be forgotten that quality of performance depends not upon machinery alone but also upon the character and disposition of manpower. Out of our present pool of some sixty million employed workers, approximately two million now have non-military jobs in the executive branch of the federal government. From the point of view of governmental achievement it makes a great deal of difference which two million out of the total the government gets and keeps. Once workers are employed, furthermore, a great deal depends on their classification and on the classification of jobs in such a way as to insure that each employee is assigned to the kind of work which he can do best. A great deal also depends on the maintenance of worker morale by seeing that equal work gets equal pay, that equal achievement brings equal opportunity for promotion, that men are permitted to do their work with a sense of creation wherever possible and with a minimum of frustration at all times, that each man knows definitely who is his supervisor for each type of work he does, so that he will not be whipsawed between rival bosses, and so on. Workers should be made to feel a sense of appreciation for work well done. They should derive from it a sense of security in employment. They should have those rewards in the form of vacations and retirement provisions which have come to be generally regarded as conditions of the good life in the United States. Some of them need also the threat of demotion or dismissal as a reward for work inadequately done. Not only the burden on the taxpayer but also the effect on the morale of competent employees makes it important that dead wood be pruned away at every level. At all times and particularly at times of international crisis, it is a matter of major importance that all government workers should be firmly loyal to their own country.

RECRUITMENT OF GOVERNMENT WORKERS

The Constitutional Base. The Constitution deals only briefly with the selection of administrative personnel. It provides in Article II Section 2, that the President

> shall nominate, and, by and with the advice and consent of the Senate, shall

> appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in heads of departments.

The Constitution draws no line between those inferior officers who, if Congress so provides, may be appointed by the President or by the heads of departments without senatorial confirmation, and those upper level officers for whose appointment senatorial confirmation is essential. Nor does the Constitution forbid Congress to require senatorial confirmation even of the appointments of inferior officers. A great deal, therefore, is left to congressional discretion in the matter.

The appointments for which Congress requires senatorial confirmation include top policy-making positions and those with salaries in the higher brackets. As to salaries, there is no definite line of demarcation; but when figures rise to $5,000 and $7,500, patronage-hungry senators begin to look avidly at the possibilities for power which would lie in a confirmation requirement. This subject, and the process of making appointments with senatorial confirmation, were discussed in an earlier chapter.[1] Our concern here is with the thousands of appointments for which senatorial confirmation is not required and which therefore may constitutionally be allocated to the President alone or to the heads of departments.

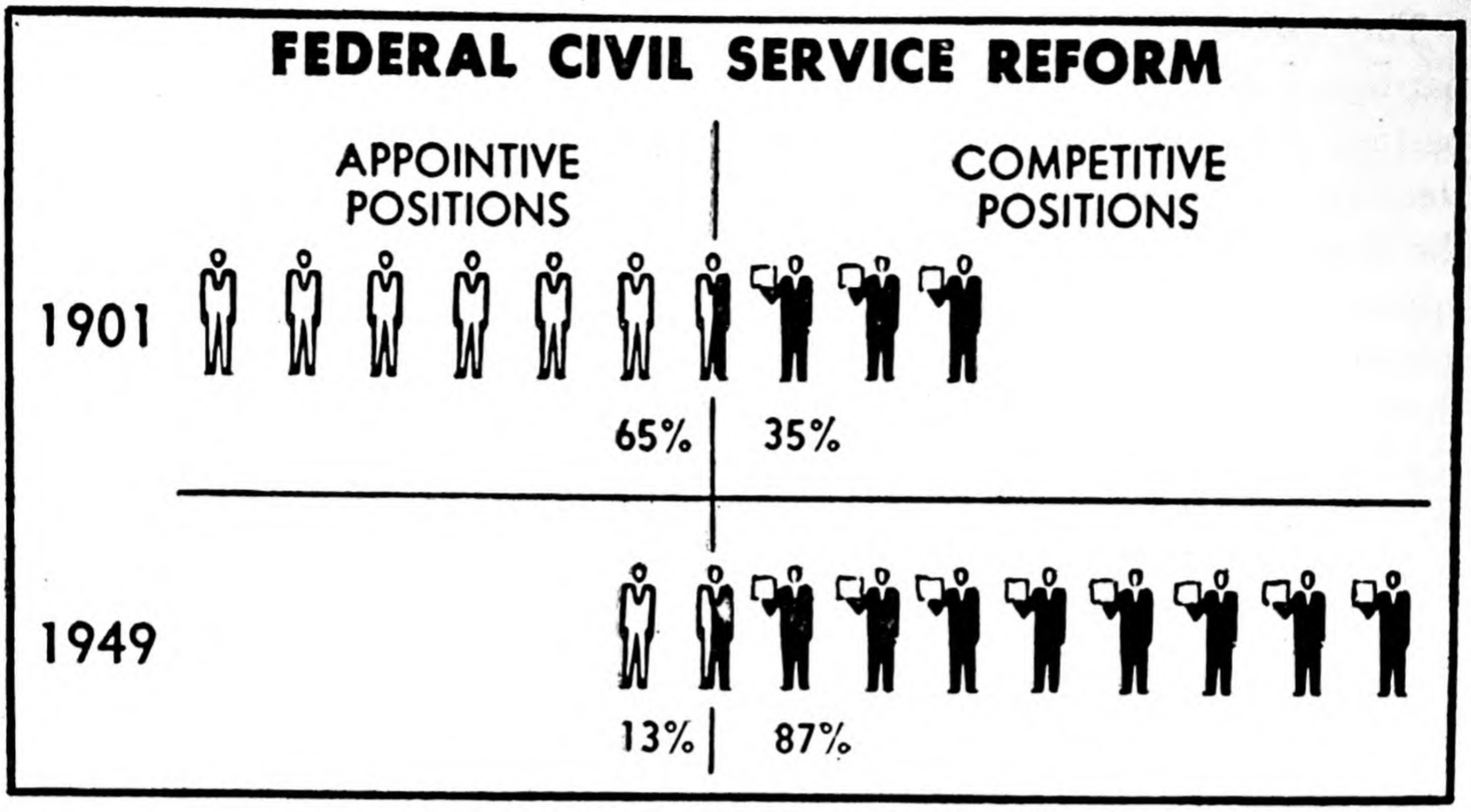
Historical Developments. When, as during the first decade under the Constitution, the federal government was a small establishment with only a few score employees, and the challenge of establishing a new nation was still strongly felt, it was possible for the President and heads of departments to know and employ men reasonably well fitted even for the most inferior positions. In the ensuing decades, the Jeffersonian Republicans administered governmental powers with something of a sense of mission which oftentimes drew people to the public service apart from consideration of salary. Although such changes are always gradual, it was with the election of Andrew Jackson in 1828 that political office at the lower appointive levels came to be regarded in a sense as the spoils to which members of the victorious political party were entitled. A spoils conception of office, operating alone, inevitably lowers the standard of appointments. Coupled with this development came a decline in aristocratic control of the federal government and the importation into national leadership of common men. The Jacksonian administration reflected hostility to special privilege whether in the form of social power or economic. It operated on the assumption, furthermore, that one man was pretty much as good as another when it came to holding a government job, and that by and large governmental service would be better performed if jobs were passed around from time to time rather than held by persons permanently entrenched.

1. See Chapter 15.

The succeeding half century and more saw the building up of office patronage as a prize of enormous value in the eyes of contending political parties. Abuses grew more and more serious. The numbers of employees steadily increased, so that it was no longer possible for the President and the heads of departments to know any large percentage of the clamoring applicants. The same was true even of the members of Congress who joined in pressing on the executive officers eager candidates from among their constituents. The battles for office under the first Republican administration seemed hardly less intense than the struggles which took place on the Civil War battlefields. In the period of relaxed political and moral standards after the Civil War, the handling of patronage became a matter of utter grossness. The trend culminated in 1881 in the assassination of President James A. Garfield by a disappointed office seeker.

The Pendleton Act. Already the unrestrained struggle for patronage had brought serious criticism of the government and the major political parties and some feeble but ineffective attempts to improve the selection of government employees. The Garfield assassination resulted in the enactment of the Pendleton Act of 1883, which marks the beginning of a merit system for appointments to inferior federal offices. The statute provided for a Civil Service Commission consisting of three members, not more than two of whom could be from the same political party, and initiated what has been commonly known in the United States as the Civil Service System. Under the act as originally drafted and as amended from time to time, groups of positions in the federal government are set aside to be filled by appointees chosen not on the basis of political favor but of merit as demonstrated in examinations prescribed by the Civil Service Commission. The original act brought under the merit system only a small percentage of the total number of employees. Additions have been made from time to time either by statute or by the President as previously authorized by statute. There have been periodic backward movements. When a political party comes into power after some years out of office, there is tremendous pressure to find positions for deserving Democrats, or Republicans, as the case may be. A national crisis which calls for the sudden addition to the government payrolls of large numbers of employees usually brings about relaxation or abandonment of merit system rules in particular fields. In general, however, the trend has been to increase the percentage of employees selected on the basis of merit.

Civil Service Examinations. A merit system works best when the duties of the positions to be filled can be accurately described and examinations can be framed to test ability to perform those duties. There are large numbers of positions of this kind throughout the government, ranging all the way from those of file clerks and typists to positions requiring highly technical skills in the natural sciences. When employees for such positions are needed, the Civil Service Commission announces an examination and



arranges to hold examinations at various points throughout the United States. The examinations are graded and a list of eligible applicants is made up, giving special preference to veterans, as discussed below, and also measuring eligibility in terms of a requirement that positions be allocated to applicants from the several states according to population.

Unassembled Examinations. The Civil Service Commission has done its best work in recruitment by giving the type of examination described above to measure fairly specific skills. There are other and, as a rule, far more important positions, however, for which the skills cannot be accurately prescribed and applicants cannot be tested by formal examination. Such positions may call for broad knowledge of one or more of the social or natural sciences and for the ability to appraise new materials in terms both of knowledge and of penetrating insight. The appraisal of the candidate may have to be made in terms of work which he has done over a long period rather than by anything he can do in a few hours in an examination room under the watchful eye of a government proctor.

For such positions, the Civil Service Commission provides what are called unassembled examinations, which take their name from the fact that applicants do not assemble at particular points to be tested. On the unassembled examination, the applicant lists in detail the training and experience he has had in line with the requirements of the position in question. He lists his education, employment, teaching experience, and other relevant data, and submits copies of his relevant publications. Such examinations are extremely hard to grade with any degree of accuracy. The fact that two men have twenty-four college credit hours in constitutional law and public administration for which they received the same grade does not mean that they have developed in any sense comparable abilities for a job

which the Civil Service Commission may classify as "social science analyst." The fact that a man has written one brilliant article constitutes no proof that he will display similar brilliance in sizing up a situation for his superior in the Department of Agriculture. Neither his publications nor his unpublished manuscripts reveal the extent to which his writing has been aided by effective coaching. In short, it is relatively easy to measure and test where highly routinized performance is required; but where the exercise of sound judgment and creative ability are required, so many intangible factors are involved that simple methods of testing fail to get the desired results.

These immeasurables, along with the desire to find places for deserving Democrats and the inability of the Civil Service Commission to move with adequate speed, were involved in decisions early in the New Deal period to exempt the personnel of most emergency programs from civil service requirements. No one knew how to set up examinations for job-holders whose task would be to curtail agricultural production, spread employment, or reverse the downward trend of the business index. Little could be done except hire in large numbers workers who looked promising to prospective employers and political referees, and then trust to the ingenuity of top leadership. There may have been a basis of common sense in the remark attributed to Postmaster General James A. Farley who, when asked if he believed in a merit system, replied that of course he believed in a merit system — and what could provide better evidence of merit than the fact that a man had supported Franklin D. Roosevelt in 1932?

President Roosevelt eventually brought under civil service those federal employees subject to his jurisdiction in the matter and in 1941, as a result of the enactment of the Ramspeck Act of 1940, several thousand of the

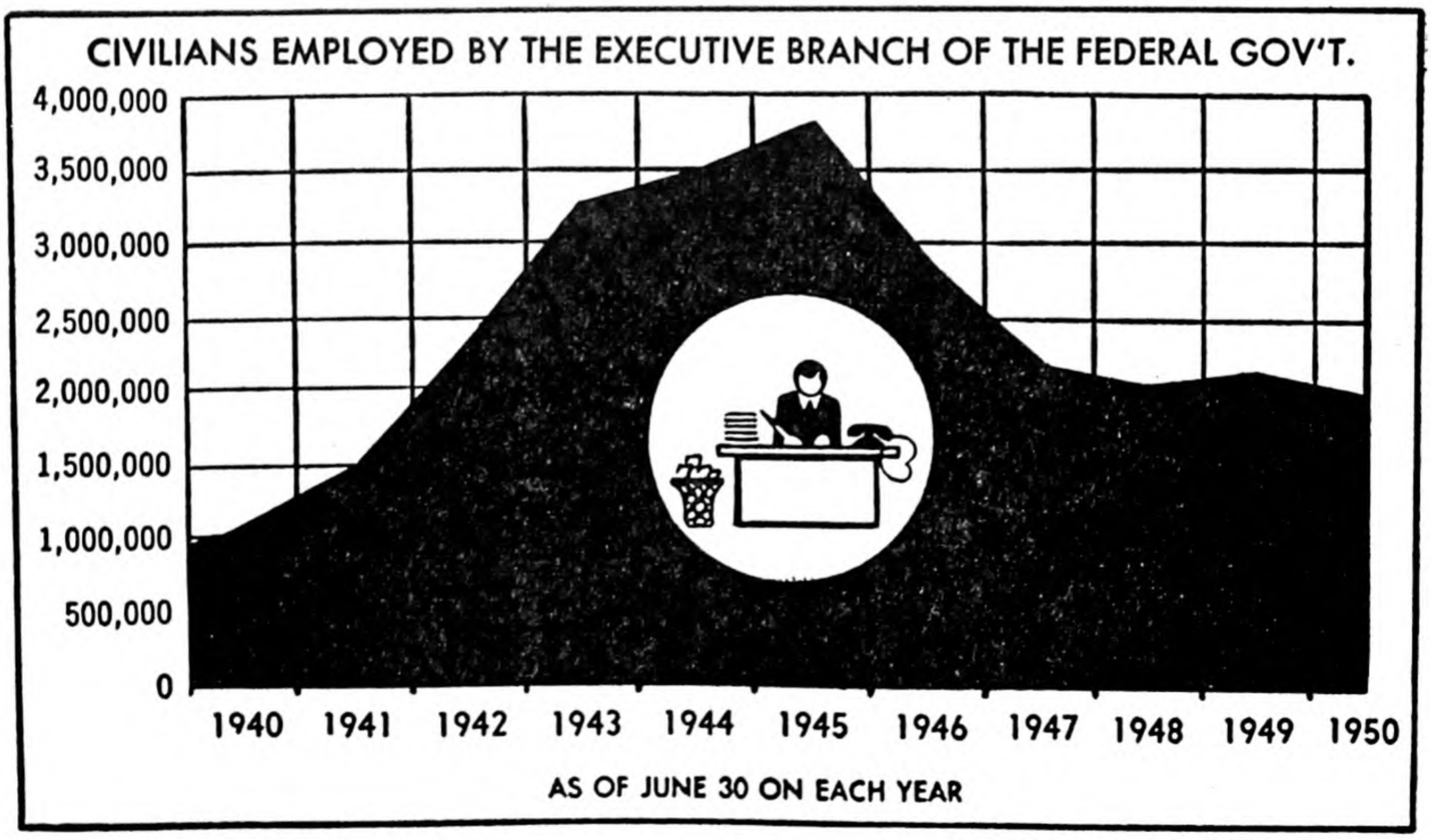


Chart by GRAPHICS INSTITUTE, N. Y. C.

recent employees were brought under the merit system on certification of at least six months of satisfactory service and the passing of non-competitive qualifying examinations. Although this step was cynically regarded by some as a device for giving protection to politically appointed employees, there was much to be said for it. Workers whose duties were not subject to measurement by any type of examination that could be devised were tested on the job. If both the government and the workers in question could afford the time and the trouble, and if the pressures of politics did not place too much restraint on the ultimate rejection of unsatisfactory employees, it would be well if much more extensive use could be made of trial periods of employment as a measure of fitness. People now chosen on the basis of civil service examinations, it is true, are subject to probation at the beginning of employment, but the political situation is such that, as a rule, only gross negligence or inability brings about dismissal.

World War II once more flooded the federal government with emergency employees, but large numbers of those with only emergency status were displaced at the close of the war either by former employees in permanent status or by veterans having special rights given by Congress. The transition to peace-time status brought various adjustments in the examining system. Among these was the extensive use of aptitude tests. Apparently the development of adequate psychological tests to determine areas of competence of government workers is not yet far along, but further development is to be expected.

Attraction of Competent Workers. As the government service grows more complicated and as business competition for manpower grows more severe, the Civil Service Commission realizes all the more keenly that steps must be taken to draw competent workers into the federal service. It works much more closely with colleges and universities than in earlier years. It consults with teachers of political science and related subjects. It attempts to secure prominent posting of notices of forthcoming civil service examinations. It tries with varying degrees of success to make government employment attractive to young people.

The commission finds itself in a traditional difficulty in that in times past its most successful examinations have been those which tested actual ability to perform particular tasks rather than the probable ability of a prospective worker to develop to the performance of higher duties. It has been reluctant to follow the path of the British merit system which places emphasis on over-all training, breadth of knowledge, and keenness of intelligence rather than on particular skills. All too often American university training has made the same mistake. Says a prominent government executive:

> We have generally overdeveloped our specialists for a great many reasons. One is our system of education. Most of our universities turn out specialists by the thousands, but all too few men with general education and a broad knowledge of public affairs. Another is our civil service system. We now

> make it easier to recruit and classify specialists than general managers. And it is the official who fights for his specialty — not the man who plays the team game — who gets the gravy in promotion and professional prestige.[2]

Veteran Preference. It is a far cry from a conception of government employment as a reward for political or other service to a conception of it as a service which first of all needs to be run with as much efficiency as possible for the benefit of the country as a whole. Many top and some intermediate positions are still viewed largely as political plums. The long-prevailing requirement that civil service employees must be selected from the several states according to population suggests a right to employment rather than the right of the country to be well served. The giving of special preference to veterans in civil service positions illustrates, par excellence, the conception of government jobs as rewards for duty well done. In 1944, before World War II had come to an end, and when it appeared that the termination of the war might leave millions of veterans unemployed, Congress enacted a veterans' preference measure to insure that veterans would get first claim on government jobs. Some minor positions were allocated specifically to veterans. Specific numbers of points, varying with whether or not there were service-connected disabilities and other considerations, were added automatically to civil service ratings in such a way as to insure that veterans would get first claims on most civil service jobs. Exceptions were made, it is true, in the case of professional and scientific positions in the higher levels in order to insure competence where competence was most needed. But even so the result, by and large, was to clog the federal civil service with thousands of employees part of whose competence was not measured by their ability to do the job for which they were hired but by the fact that they had once honorably served their country in an entirely different way. The addition of veterans' points, indeed, operated in such a way that candidates who failed to obtain a passing grade on the basis of merit were placed on civil service registers and were given positions in advance of non-veterans who had passing grades.

CLASSIFICATION AND SALARIES

The Classified Service. If the government is to get adequate service from its employees and if the employees are to get the salaries and prestige they deserve, each position held by a government worker must be classified in terms of the ability it requires and the amount of responsibility it involves. The classification of postal workers and employees of the Foreign Service of the United States is provided for by individual statutes. Outside these two important groups a single pay statute, the Classification Act of 1949, covers most positions of white collar employees, a total of some 885,000 as estimated at the time the act was passed.[3] The statute established two

2. James V. Forrestal (with the assistance of Don K. Price), "If the U.S. is Really to Do a Job — ," *New York Times Magazine*, May 9, 1948, p. 50.
3. See *Revision of Classification Act of 1923, as Amended*, House Report No. 1264, 81st Cong., 1st sess., p. 2.

compensation schedules. The first, known as General Schedule, or GS, includes clerical, sub-professional and professional workers; it is divided into eighteen grades, with the beginning salaries ranging from $2,200 to $14,000. The second schedule, called the Crafts, Protective, and Custodial Schedule, or CPS, is divided into ten grades, with initial salaries ranging from $1,500 to $4,150. The General Schedule rates, with the step-increases which are possible in each grade, are as follows:

Grade	Per annum rates						
GS–1	$2,200	$2,280	$2,360	$2,440	$2,520	$2,600	$2,680
GS–2	$2,450	$2,530	$2,610	$2,690	$2,770	$2,850	$2,930
GS–3	$2,650	$2,730	$2,810	$2,890	$2,970	$3,050	$3,130
GS–4	$2,875	$2,955	$3,035	$3,115	$3,195	$3,275	$3,355
GS–5	$3,100	$3,225	$3,350	$3,475	$3,600	$3,725	$3,850
GS–6	$3,450	$3,575	$3,700	$3,825	$3,950	$4,075	$4,200
GS–7	$3,825	$3,950	$4,075	$4,200	$4,325	$4,450	$4,575
GS–8	$4,200	$4,325	$4,450	$4,575	$4,700	$4,825	$4,950
GS–9	$4,600	$4,725	$4,850	$4,975	$5,100	$5,225	$5,350
GS–10	$5,000	$5,125	$5,250	$5,375	$5,500	$5,625	$5,750
GS–11	$5,400	$5,600	$5,800	$6,000	$6,200	$6,400	
GS–12	$6,400	$6,600	$6,800	$7,000	$7,200	$7,400	
GS–13	$7,600	$7,800	$8,000	$8,200	$8,400	$8,600	
GS–14	$8,800	$9,000	$9,200	$9,400	$9,600	$9,800	
GS–15	$10,000	$10,250	$10,500	$10,750	$11,000		
GS–16	$11,200	$11,400	$11,600	$11,800	$12,000		
GS–17	$12,200	$12,400	$12,600	$12,800	$13,000		
GS–18	$14,000						

The step-increases within each grade are ordinarily awarded at the end of each year of service until the maximum salary for the grade has been attained, provided that the employee has an efficiency rating of "good" or higher. When the top salary for the grade has been attained, the pay of the individual remains fixed unless and until he can secure promotion to a higher grade.

In setting up the General Schedule, Congress summarized the characteristics of each of the eighteen grades. Descriptions of the first and last and one of the intermediate grades are presented here to show the extent to which executive agencies are controlled by Congress in the matter.

Grade GS–1 includes all classes of positions the duties of which are to perform, under immediate supervision, with little or no latitude for the exercise of independent judgment, (1) the simplest routine work in office, business, or fiscal operations, or (2) elementary work of a subordinate technical character in a professional, scientific, or technical field.

Grade GS–8 includes all classes of positions the duties of which are (1) to perform, under general supervision, very difficult and responsible work along special technical or supervisory lines in office, business, or fiscal administration, requiring (A) considerable specialized or supervisory training and experience, (B) comprehensive and thorough working knowledge of a specialized and complex subject matter, procedure, or practice, or of the principles of the profession, art, or science involved, and (C) to a considerable extent the exercise of independent judgment; or (2) to perform other work of equal

importance, difficulty, and responsibility, and requiring comparable qualifications.

Grade GS–18 includes all classes of positions the duties of which are (1) to serve as the head of a bureau where the position, considering the kind and extent of the authorities and responsibilities vested in it, and the scope, complexity, and degree of difficulty of the activities carried on, is exceptional and outstanding among the whole group of positions of heads of bureaus; (2) to plan and direct or to plan and execute frontier or unprecedented professional, scientific, technical, administrative, fiscal, or other specialized programs of outstanding difficulty, responsibility, and national significance, requiring extended training and experience which has demonstrated outstanding leadership and attainments in professional, scientific, or technical research, practice, or administration, or in administrative, fiscal, or other specialized activities; or (3) to perform consulting or other professional, scientific, technical, administrative, fiscal, or other specialized work of equal importance, difficulty, and responsibility, and requiring comparable qualifications.

These descriptions of positions are extremely general. The Civil Service Commission is directed, after consultation with the departments, to prepare standards for placing positions in their proper classes and grades. In terms of the standards prescribed by the statute and further developed by the Civil Service Commission, each department classifies its positions in terms of the grading system. The Commission, however, acts as a review agency to see that positions are properly and uniformly classified — to see, for example, that in given instances positions are not deliberately graded upward to secure higher salaries or more prestige than the circumstances justify. Congress has attempted, in other words, to decentralize the classification as much as possible but to provide at the same time for adequate supervision and correction on the part of the Civil Service Commission.

Although enactment of the Classification Act of 1949 was undoubtedly speeded by recommendations of the Hoover Commission, the Civil Service Commission itself had long been urging Congress to enact clear legislation on the classification of positions. It had been concerned about a number of evils, including the practice commonly called "empire building." The heads of agencies normally attempt to secure as many employees as possible, and to increase their agency budgets because of the belief that growth in size would bring advancement in grade. The Commission urged that in the new measure

> It should be made perfectly clear that supervisors are not to be rewarded by having their positions placed in higher grades solely because of their ability to expand the size of the supervisory group for which they have responsibility.[4]

The statute made no mention of "empire building," but it did provide for the more adequate classification of jobs, and in addition it provided rewards for enterprise along other lines. It required that each department establish an Efficiency Awards Committee to make systematic reviews of the operations, activities, and functions of each unit. The committee was to

4. *64th Annual Report, United States Civil Service Commission,* 1947, p. 3.

identify the supervisors and employees who had promoted outstanding efficiency and economy in administration, and make them cash awards or increase their rates of basic compensation. Any such award was to be "given due weight" in the selection of employees for promotion to higher grades. This "Management Improvement Plan" operates under the supervision of the Bureau of the Budget, which is directed to report results annually to Congress. It remains to be seen whether this arrangement will properly channel the energies of those employees who are driving for their own advancement and bring into the spotlight those whose advancement will do most to promote good government.

Efficiency Ratings. The merit system was initially intended to prevent removal from office of workers who refused to make political contributions or render political services, or to make place for political favorites. It has never been intended, however, to guarantee employment to workers who render poor service. To aid in determining which employees should be dismissed or demoted, and which should be retained in their present positions, given step-advancements in salary or promoted, the several departments and agencies operate an efficiency rating system under the supervision of the Civil Service Commission, with a right of review in a departmental review board. The performance of each worker is rated periodically in terms of such standards as "excellent," "very good," "good," "fair," and "unsatisfactory." The system is undoubtedly useful in measuring fairness of treatment of employees and in seeing that the right people are retained in or promoted to the right jobs. For many workers it provides an added stimulant to doing good work.

Unfortunately, it also has its drawbacks, some but not all of which are caught by review of ratings. Each employee is rated by his own supervisor. In addition to deciding what kind of performance should be graded as excellent or very good, and so on, there is an inevitable tendency to give high ratings to personal friends and employees who treat the supervisor with great deference and to rate downward those who for some reason fail to maintain friendly connections. A new bureau chief or assistant secretary often brings along with him subordinates from his former field of employment. He tends to give high ratings to these subordinates and to reduce the existing ratings of continuing employees from the old regime.

Other considerations enter in. A shrewd newspaper observer of departmental happenings comments on:

> The army supervisor who refuses to give an employee under him an "excellent" rating. He reasons that no human being can be perfect — his own definition of excellence. But he can accept an excellent rating for himself.[5]

Again, a Veterans' Administration supervisor gave an employee a poor rating because "he doesn't show interest in his work by working overtime voluntarily." This employee was putting in full time and then rushing off

5. Jerry Klutz, "The Federal Diary," *Washington Post*, March 25, 1948.

to evening school classes in order to equip himself for promotion.[6] On another occasion the same observer noted that:

> More than 55 percent of all RFC employees were rated excellent, and very good ratings were given the vast majority of the remainder. RFC employees are good, but are they that good? [7]

It was noted that the RFC was making a lay-off and there was reason to believe that wholesale excellent ratings were given a good many employees to help them keep their jobs. Because of widespread dissatisfaction with the rating system, Congress included in the Classification Act of 1949 a direction that the Civil Service Commission make a study of efficiency rating systems in the federal service and submit a report to Congress.

Training on the Job. For many employees the government operates educational services. The United States Military Academy at West Point and the United States Naval Academy at Annapolis operate as full-time training institutions. Many bureaus and offices take pride in developing employee skills and abilities through instruction and experience given on a job. The graduate school of the Department of Agriculture provides the best but not the only example of formal courses within government agencies to enlarge the horizons and the competence of workers who are eager to move into better positions. Many government employers, indeed, prefer that the initial training of employees shall be reasonably broad rather than technical. While government itself can give a considerable amount of technical training, it is not equipped to provide the breadth of knowledge and understanding which enables the worker to make most effective use of technical training. For business and professional men in the higher brackets, there is value in alternating employment which shifts employees back and forth between government and non-governmental employers, thereby adding to knowledge and expanding intellectual horizons. Unfortunately, no very large percentage of government workers can afford to run the employment risks which would be involved in such shifting about.

In Washington and in other important centers of federal activity, it is the custom of large numbers of government workers to take evening courses in local schools to promote their own advancement, but the practice is by no means universal. Far more serious than the irritation of those supervisors who see their employees rushing off to evening classes instead of working over-time is the accumulation of nominal manpower with no potent desire for advancement and no aspiration to do anything beyond the minimum necessary to enable them to collect their salaries.

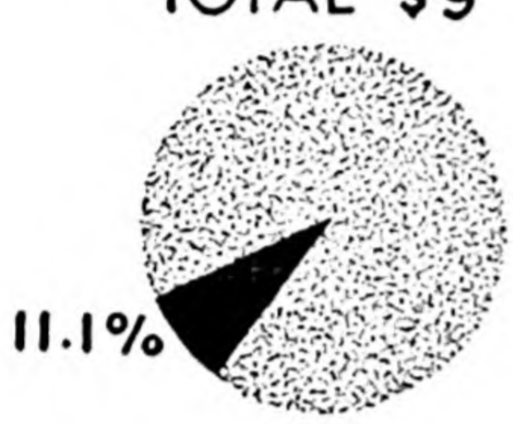
The Level of Government Salaries. Whether for better or for worse — and from the worker's point of view it is sometimes one and sometimes the other — government salary scales have been less subject to fluctuation than salary scales in private employment. Except as checked by the rising

6. *Ibid.* 7. *Ibid.*, June 6, 1948.

Billions of Dollars

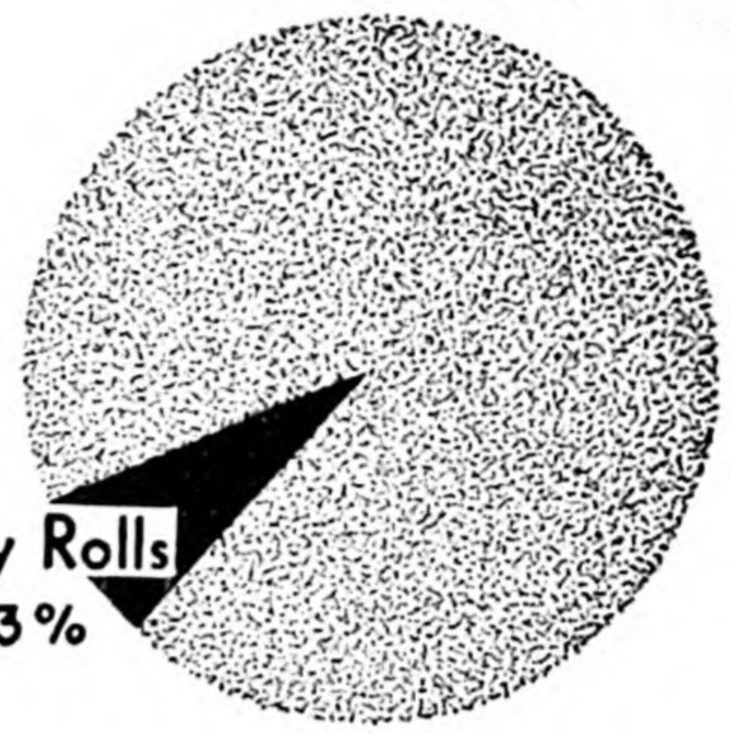
Note: · Pay Rolls exclude salaries and wages paid to employees in the Postal Service and in Government-owned corporations. (See text.)

TOTAL $9



1939

TOTAL $42.4



1951
Estimated

FEDERAL CIVILIAN EMPLOYEES BY AGENCY

Thousands of Employees

200 400 600 800 1000

National Defense — 786

Veterans — 192

Treasury — 92

Agriculture — 68

All Other — 341

Post Office — 481

1951 TOTAL,
1,960 Thousands
(Average Employment)
Executive Branch

{Includes State Dept., Commerce Dept., Labor Dept., Justice Dept., Interior Dept., Federal Security Agency, and other agencies.

FEDERAL CIVILIAN PAY ROLLS RELATED TO FEDERAL EXPENDITURES, AND NUMBER OF EMPLOYEES BY AGENCY

power of labor unions in recent years, private salaries and wages have gone down rapidly in times of depression and increasing unemployment, and have tended to climb rapidly in times of prosperity and labor shortage. By contrast, although government employment totals were reduced, the lowering of government salaries during the depression of the early 1930's was in no sense comparable to the decline in wage payments of private industry. With the return of prosperity, private wage levels climbed much more rapidly than those of government. In the period after World War II, when private industry was forced to give raise after raise in pursuit of the upward spiral of the cost of living, the government for a considerable time heeded the advice of the President that the cost of government employment be held down as one step in the process of curbing the inflationary trend.

So it is that lack of flexibility in government salaries, or excessive flexibility of private salaries and wages, brings to government a plenitude of workers in times of depression and tends to deprive it of many of the more competent ones in times of prosperity and full employment. It was for this reason, along with various others, that the government had such great difficulty in holding its able men at top levels during the reconversion period after World War II. By 1949, however, the disparity between public and private salaries and the need for more competent personnel, particularly in the higher brackets, had become so great that Congress made substantial raises in executive and administrative salaries all along the line.

Other Rewards of Government Service. In addition to salaries, the federal government provides sick-leave allotments, vacations, and retirement compensation for its permanent employees. Depending on the ethical standards of workers and their interest in their work, sick leave allotments may be used legitimately or as a means of getting additional vacation time. Vacation time can be used as it accumulates, or it can be consolidated so as to provide for single extended vacations. Here again there is great variation in the conduct of employees. Some are so interested in their work and feel so heavily the obligations of their positions that substantial portions of their annual leave eventually lapse without being used. At the opposite extreme, large numbers of workers hoard their accumulating total hours of annual leave like misers counting coins. A retirement system for government employees, to which the workers themselves make regular contributions, has been in operation for many years, and is improved and expanded from time to time. Its provisions run parallel with the social security program for privately employed persons, and with private retirement programs in operation in various fields.

Working Conditions. By and large, in comparison with working conditions in private industry, most government workers are well housed in attractive and uncrowded surroundings, but there are unfortunate exceptions. During war periods and in the depression it has at times been necessary to use temporary buildings and old office buildings made over for gov-

ernment use under conditions of considerable congestion and inconvenience. To demonstrate the desirable effects of attractive surroundings and good working equipment, the Federal Works Agency published in 1946 a report on an experiment. The agency picked a group of girls who were doing highly routinized work (punching income tax cards) in an office characterized as "a prime example of soiled and dingy painting and inadequate lighting." The Public Building Administration supplied new fixtures for the room. The Public Health Service gave eye examinations to the workers. The National Association for the Prevention of Blindness provided eye glasses where needed. The National Bureau of Standards furnished equipment to measure the brightness of light so that correct adjustments could be made. The result was more work per person per hour. The experiment was continued by painting the ceiling, the walls, the floor, the desk tops, and the card punching machines. As a result, work was turned out at a still higher rate. As far as can be determined, the total improvement was somewhere between 20 and 29 percent. The experiment demonstrated the fact that there is still room for improvement in worker efficiency by means of improvement in the surroundings and conditions of labor.[8]

Government Unions. Seldom in modern times does any very large group of workers feel safe in its relations with its employer without some form of union organization. Even though government workers are able to exert a kind of political pressure on their employer for the protection of their alleged rights which has no parallel for employees in private enterprise, they have nevertheless found it advisable to establish unions to which varying percentages of government workers belong. Postmen in various groups have been organized for half a century or more. Both the American Federation of Labor and the Congress of Industrial Organizations now have thriving government unions. Congress recognizes the right of government workers to organize but not the right to strike, and if we exclude plants of various kinds taken over by the government in order to stop or prevent strikes, striking against the federal government has never offered any serious problem.

Apart from the use of strikes to enforce their demands, government unions operate much like those in private enterprise. They concern themselves with salaries, wages, and working conditions. They took the lead during the period of rising prices after the close of World War II in attempting to persuade Congress to raise salary levels. They call attention to and seek to remedy grievances which, if presented by aggrieved persons alone, might bring retaliation from supervisors. As in any union, the leaders and some of the members may develop enthusiasm for union activities

8. *Washington Post*, December 6, 1947. Congress concerns itself from time to time with the question whether the "snack bars" which are set up in the buildings of many government departments help or hinder worker performance. A cup of coffee or a glass of milk and a sandwich may speed work and improve accuracy. On the other hand, the activity may be converted into mere loafing with fellow workers and waste of government funds. See Malvina Lindsay, "Uncle Sam's Loafers," *Washington Post*, March 25, 1948.

to the detriment of their work, but this evil does not necessarily condemn the union program as a whole. At the best, the union program can do a great deal to insure more adequate justice to large numbers of undifferentiated workers whose rights would otherwise receive inadequate attention. At the worst, the union operates merely as one more pressure group in a gigantic aggregation of pressure groups where the activities of each are to a considerable extent neutralized by the total pressures of many others.

RESTRAINTS UPON GOVERNMENT WORKERS

Limitation of Political Activities. The basic purpose of the merit system is to provide a highly skilled civil service which will operate smoothly and efficiently in the performance of governmental functions whatever the political party in power and whoever the political leaders may be. In other words, the function of the civil service is to serve the country, not to run the country. To make possible the building of the kind of service desired, the operation of the merit system has been expanded to include approximately eighty percent of the employees of the executive branch of the government. Every attempt is made to select these employees for merit and to promote, demote, or dismiss them from the service for merit or the lack of it. Every attempt is made to relieve them from obligation to any political party or to any political leader. To the fullest extent possible, they are protected against solicitation for party contributions and support of every kind for political officeholders or office seekers. The Civil Service Commission has for many years enforced regulations intended in large part to neutralize the civil service politically. The right to vote has not been denied, but anything beyond purely private political activity has been forbidden.

During the New Deal period the problem of the political activity of government workers became much more serious. At that time hundreds of thousands of new employees were brought into the federal government, most of them outside the classified service. Many of them participated in the expenditure of billions of dollars of government money for construction or relief. Critics of the administration began to regard the entire federal establishment as a gigantic boondoggling expedition spending billions of dollars through political employees of the President for the purpose of keeping the President and his party in power. For the first time the aggregation of government workers became in itself a pressure group to be viewed with deep distrust. It may have been in part the sensing of this fact that led the President and his administrative advisers to urge the expansion of the merit system upward, outward, and downward. It was undoubtedly also to some extent this fact which led to the enactment of legislation restraining the political activities of government workers whether or not they were employed under the merit system.

The legislation consisted of two measures enacted in 1939 and 1940

which from the name of their principal sponsor came to be known as the Hatch Acts. The first statute was defined as an act "to prevent pernicious political activities." It provided in part:

> It shall be unlawful for any person employed in the executive branch of the federal government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the federal government, or any agency or department thereof, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects.[9]

The President and Vice President who, of course, must participate in political campaigns if they are to be returned to office, were excepted, as were the heads of executive departments and a limited group of other immediate and policy-making subordinates of the President. The second statute attempted to neutralize in the same fashion employees of state and local governments who participated in the expenditure of federal funds allotted to them and in other ways attempted to strengthen the original statute.

Legislation of this kind is hard to enforce, but it does at the very least have the effect of driving underground some of the political activities of government employees who seek to use the power of government to perpetuate their party in power and to perpetuate their program.[10] In spite of all care that can be given to the drafting of the legislation, it is often hard to draw a clear line between those political activities which are permitted in connection with voting and private expression of opinion and those which are forbidden.

More serious perhaps is a growing concern with whether or not the legislation reflects sound public policy. It is generally agreed that neither control of expenditure of public funds nor the power of organized workers ought to be permitted to become the dominant factor in determining what party and what officers should come into power. On the other hand, government unions and the aggregation of government workers as a whole constitute only one of the many powerful interests competing for control of the government. It seems hardly fair to select this one group for political neutralization. As for the relation of political activity to the expenditure of government funds, very few people took seriously the complaint of ultra-conservatives during the depression period that people on the government's relief rolls ought to be deprived of the right to vote or participate otherwise in political activity. It would be regarded as highly ludicrous if it were proposed that political activity should be forbidden to all farmers receiving benefits from the government's price support program. It would be regarded as evidence of lunacy if it were seriously suggested that political activity be forbidden to all who benefit from the protective tariff.

9. 53 Stat. 1148.

10. For Supreme Court decisions on the constitutionality of the Hatch Acts see *United Public Works* v. *Mitchell*, 330 U.S. 75 (1947), and *Oklahoma* v. *United States Civil Service Commission*, 330 U.S. 127 (1947).

The problem has further ramifications. The approximately two million federal employees, and the uncounted hundreds of thousands of state employees connected with the expenditure of federal funds, constitute a sizable proportion of the active electorate. They constitute a still larger proportion of those people who have sufficient knowledge of governmental problems to make their judgment of great value. One effect of neutralizing these employees may well be to enhance the power of political bosses and lower the level of intelligence operating in the political process. While the evils at which the Hatch Acts are directed demand attention, it is by no means obvious that the sweeping neutralizing provisions of the legislation bear any resemblance to a wise solution.

Restrictions on Speculation. Besides politics, there are other fields in which government employees are forbidden to use their positions as bases for achieving personal advantage. Some employees have advance information about the intentions of government agencies to make huge purchases which will affect market prices and to regulate business activities in various ways which have the same effect. Speculation on the basis of such information is forbidden. There is no question about the justice of such a policy. The difficulty lies in the matter of enforcing it. Those who are not restrained by their own ethical standards can usually find ways of acting through relatives or friends if they wish to do so. As a rule it is only when major scandals are involved or when for political purposes charges of illegal speculation are made against high officials that anything resembling full disclosure is likely.

The Loyalty Requirement. Before World War I only two brief periods, those of the War of 1812 and the Civil War, provided serious strains on national loyalties. During neither period was disloyalty within the government a highly serious matter. During World War I it was pro-Germanism in the vicinity of the armed forces and among the people generally that was most feared, rather than in the government itself. Since that time, however, the termite-like invasion of Russian-sponsored communist doctrines has rotted national loyalties at so many points as to keep Congress in a fever of anxiety about the loyalty of government employees. Disclosures in Canada revealed the fact that the Soviet Union continued wholesale espionage against its allies during World War II, with the connivance of certain disaffected Canadian citizens. The trials of Alger Hiss, a former prominent State Department official, which were conducted in 1949 and 1950, disclosed the fact or the probability that long before the war began highly respectable Americans in high places had been betraying confidential government information to Russian agents. The trials of Judith Coplon, a Department of Justice employee, held also during 1949 and 1950, disclosed the continuation of Russian espionage and seduction of government workers. The sensational if often poorly authenticated disclosures of the House Committee on Un-American Activities added to fears that the qualities

of citizenship were disintegrating at the very heart of the government. The announcement in 1950 that the United States would proceed with development of the hydrogen bomb, and the almost contemporary news that a German-born British citizen, Klaus Fuchs, who as a noted scientist had been admitted to the innermost secrets of the atom bomb and the hydrogen bomb and had disclosed those secrets to the Soviet Union, intensified the anxiety of the whole country about the integrity of government employees.

Through various investigative agencies the federal government had for many years been checking the backgrounds of most candidates who were being considered for permanent employment. Congress entered the picture in 1939 via a provision in the Hatch Act of that date forbidding employment of any member of a political party or other organization which advocated overthrow of our constitutional form of government. On the basis of that statute the Civil Service Commission in 1940 declared that it would not certify for employment the name of any person who was a member of the Communist party, the German-American Bund, or any other communist or Nazi organization.

Throughout World War II the investigative agencies of the government checked as carefully as possible for evidence of disloyalty on the part of people being considered for employment. As ideological conflict was resumed with our former Russian allies, members of Congress and others began to demand a more thorough screening of government employees to locate communist sympathizers. Perhaps fearful of a witch hunt dictated by Congress, President Truman took the lead by setting up machinery for careful checking on the loyalty of all employees of the executive branch. In March, 1947, he issued an executive order prescribing procedures for the administration of an employee loyalty program in the executive branch of the government.[11]

Loyalty Board Procedures. Pursuant to this order, loyalty boards were set up in each department and agency. Regional boards were established throughout the country for examination of field employees and applicants for field positions. A loyalty review board was set up in the Civil Service Commission to hear appeals by persons aggrieved by loyalty board decisions. Much of the responsibility for collecting evidence was placed in the Federal Bureau of Investigation.

A wholesale examination of all federal administrative employees was undertaken. Hosts of government workers faced the prospect with something of the attitude of school children when told that they must go through some kind of de-lousing process. For the great mass of them, however, against whom no evidence of disloyalty of any kind was found, the procedure was carried to completion without an interview of any kind and even without their knowledge. By the end of 1948 more than 2,350,000 loyalty forms had been processed. Of these less than 8,000 involved enough questionable evidence to call for full investigative treatment. Out of these,

11. Exec. Order No. 9835, 12 F.R. 1935.

agency boards had reached 103 unfavorable determinations. Over half of those found disloyal had appealed to their agency heads, which was the first appellate step from the agency loyalty boards, and thirty-five had gone on to the final step by an appeal to the loyalty review board. As of that date only about fifty people had actually been ousted from the government for disloyalty, while some 330 additional persons had withdrawn from their jobs or withdrawn job applications while under investigation.[12]

The investigations worked less damage to reputations and created less individual discomfort than had been anticipated. Even so some of the characteristics of procedure were unfortunate. Most serious was the refusal of the FBI to reveal the sources of its evidence for disloyalty or to permit the calling of its witnesses so that the defendants might confront them at open hearings. Each set of hearings constituted a kind of trial of the person being investigated. A trial without disclosure of the sources of all the evidence and without the privilege of cross-examining witnesses is alien to the Anglo-American tradition of justice. The excuse offered by the FBI was that the presentation of witnesses would give publicity to the methods of investigation and identify the investigators so that the effectiveness of the FBI would be greatly reduced thereafter. The loyalty review board, which consisted of a group of distinguished lawyers and professors,[13] accepted this procedure reluctantly. In doing so it may well have been influenced not so much by the argument of the FBI as by the fact that the government has a constitutional right to dismiss at any time any employee for any reason satisfactory to itself.[14] If a worker has no constitutional right not to be dismissed, it seems clear that he had no constitutional right to a particular type of procedure to determine whether or not his dismissal should be ordered.

While it is obviously true that no person has an absolute right either to get or to keep a government job, this does not mean that individuals may not have claims to consideration which are not guaranteed by the Constitution. The Constitution prescribes only a necessary minimum of protection, and not the full scope of careful conduct which sound considerations of public policy may impose. In difficult situations, however, the rights of individuals may have to give way to considerations of public safety. In what are called "sensitive" agencies, such as the Department of Defense, the Atomic Energy Commission, and the Department of State, Congress has found it expedient to authorize disloyalty dismissals without resort to loyalty board procedures of any kind. The considerations involve a balancing of one kind of welfare against another. While the screening of employees has revealed little evidence of disloyalty, there is evidence that in a few instances, particularly in connection with the atomic energy program, the American people now face incalculable danger as a result of the

12. *New York Times*, January 16, 1949.
13. *Washington Post*, November 9, 1947.
14. See the statement of the aims and procedures of the Loyalty Review Board as presented December 23, 1947, by Seth W. Richardson, chairman of the board, *New York Times*, December 28, 1947.

disloyal activities of a few people. In the future it may be necessary for millions of employees to undergo the discomfort of careful investigation in order to protect the United States against the machinations of the disloyal few.

Oddly enough, the most articulate opposition to the government loyalty program has come from scientists who operate in areas wherein lies the greatest danger to the United States of disclosures of secret matters to a potential enemy. Any scientist of first-rate ability has the option of accepting private employment rather than working for the government. He is likely to feel that the discomforts of investigation and the possibility of having questions raised about his loyalty are too great a price to pay for the privilege of working for the government rather than for a private employer. He knows that the crude handling of investigations has caused a great deal of embarrassment to some of his scientific colleagues. Even in the face of evidence to the contrary, he is perhaps inclined to assume that no highly skilled scientist could be guilty of disloyalty to his country. This attitude is important because it may mean the loss of valuable personal services to the government in the race for newer and more destructive weapons which is now going on.

Removals by Congress. The rights of workers can be as grossly violated by Congress as by administrative superiors. During the early years of the unsavory career of the Committee on Un-American Activities of the House of Representatives, hearings were held which, according to the chairman, Martin Dies, revealed a number of government employees as "irresponsible, unrepresentative, crackpot, radical bureaucrats" and as affiliates of "communist front organizations." Three of the criticized employees were Goodwin B. Watson, William E. Dodd, and Robert Morss Lovett, against whom nothing seems to have been proved except a measure of New Deal liberalism. A subcommittee of the House Committee on Appropriations held additional hearings on these men, operating in closed session and denying them the right of counsel. Working in this secret fashion, the committee came to the conclusion that the three men had been engaged in subversive activities. Thereafter, in passing an appropriation bill from which the three would normally be paid, Congress provided that none of the money appropriated should be expended for salaries of these men unless they were reappointed to office and the new appointments were confirmed by the Senate. The effect was to take the three off the payroll.

Watson, Dodd, and Lovett brought suit for their salaries in the United States Court of Claims, denying on various legal grounds that Congress had any constitutional right to bring about their removal in this fashion. They won their case in the Court of Claims and again in the Supreme Court. The latter held that the statute was a legislative act decreeing punishment of the three men for their conduct without the benefit of a judicial trial. A statute which decrees punishment without judicial trial is a bill of attainder, and the Constitution prohibits the enactment of bills of attainder.

The statute was therefore unconstitutional and the three were held entitled to their salaries.[15]

Congress sometimes finds ways of doing the same thing without technical violation of the Constitution. During the period of World War II, a number of legislators developed ardent dislike for the then head of the Office of Price Administration. Word was permitted to reach proper quarters that appropriations for the agency would be drastically cut unless there was a change in leadership. It was found advisable to make the change, and the desired appropriations were voted.

Another legislative device for achieving the same purpose is to change the qualifications for holding particular positions so that officeholders who are unpopular with Congress cannot meet those qualifications. The Commissioner of Reclamation, for example, and a subordinate who was director of the Reclamation Bureau's Sacramento regional office antagonized certain western members of Congress by their rigorous enforcement of reclamation laws. The congressional enemies of the two men succeeded in 1948 in attaching to the Interior Department appropriation bill a provision that the holders of those offices should be engineers of at least ten years' engineering experience. Since neither of the two men was an engineer, they were disqualified for further occupation of their offices.[16]

The purpose of this discussion is not to stigmatize either Congress or members of the executive branch as peculiarly vicious in coping with government employees who have conceptions of public policy different from their own or which frustrate private desires. It is rather to indicate that there are traits of prejudice and ruthlessness which tend to characterize the activities of people everywhere, whether in business, the professions, or government, and which need to be guarded against wherever they may be found. As was said above, no man has an inherent right to a government job, yet dismissal on grounds of disloyalty or subversive activity or general unfitness discredits an employee and handicaps him in his search for future employment. For this reason the government owes him rigorously fair treatment.

The matter has still another important angle. Government has a growing need for competent men. If it develops a reputation for abusive treatment, it will have difficulty in attracting the right men to public service. Neither bureaucratic bullying nor the kind of sadistic performances put on by the Committee on Un-American Activities will benefit the government's reputation as an employer.

THE GOAL OF PERSONNEL ADMINISTRATION

The goal of personnel administration is the selection, retention, development, and effective utilization of high grade personnel in government. The task varies with the needs of the times. It has been said that:

15. *United States* v. *Lovett,* 328 U.S. 303 (1946).
16. See the *Washington Post,* May 28 and 31, 1948, and the *New York Times,* May 13, 1949.

> The British reformed their civil service in the nineteenth century. They had to, because they had stumbled into a position of world leadership. Then in the twentieth century they reformed their system of administrative co-ordination. They had to, for purposes of national defense.[17]

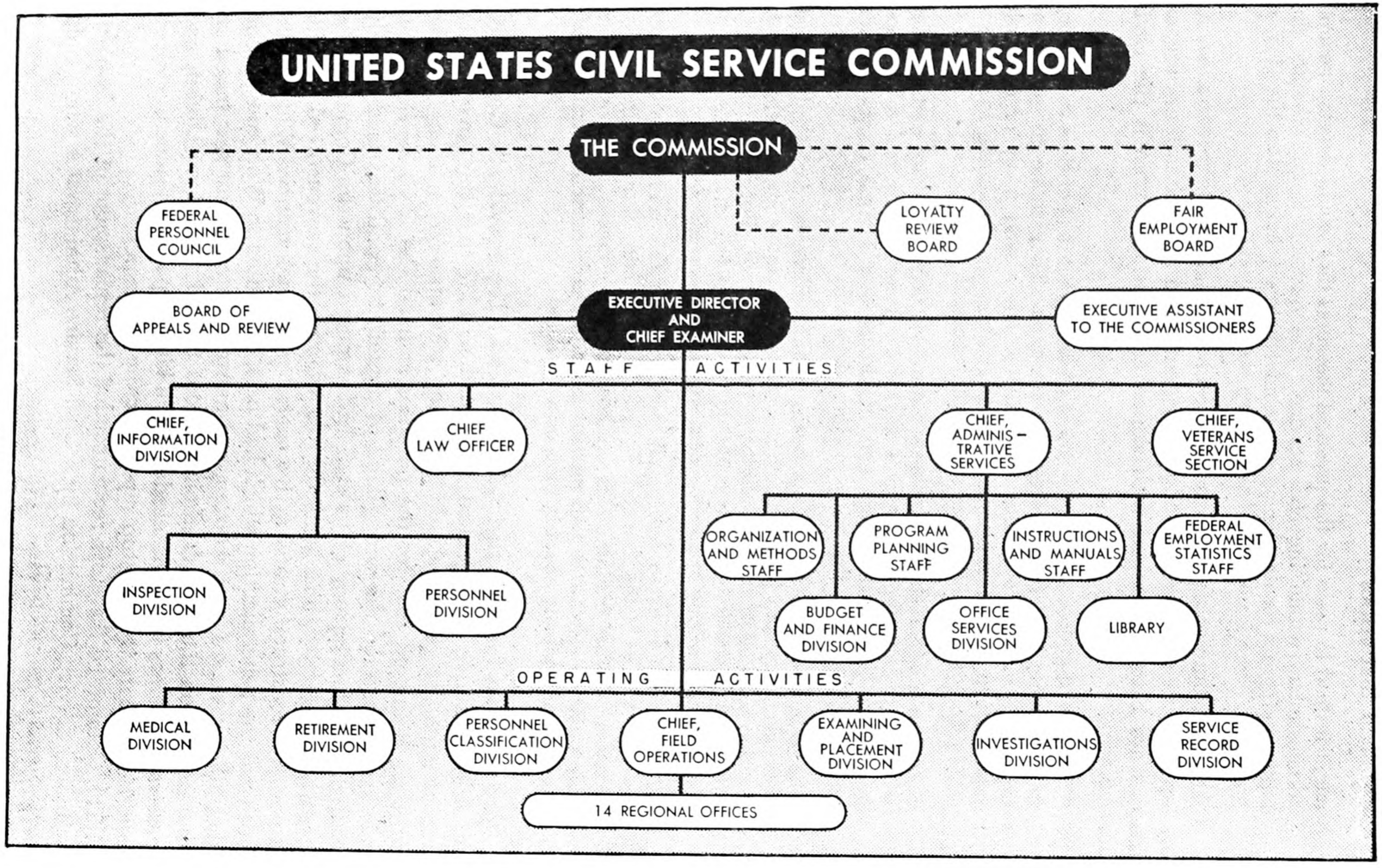
An American observer comments as follows upon recent developments in the British civil service system:

> Up to the last year the British Commission picked its candidates for its administrative class by academic written tests. As the result of the experience in selecting officers for the war, the British Commission has advanced to the use of methods closely akin to those which have been developed in this country by the National Institute of Public Affairs. The emphasis of the tests now in Great Britain is to discover sound qualities of personality as well as of intellect. Has the candidate force, imagination, initiative, as well as intellectual power? Is he that rare sort capable of bringing things to pass? The British Commission itself gives a large part of its time, in co-operation with the educational authorities of the colleges and universities, to the finding every year of between fifty and one hundred young persons of top quality to be introduced after academic training, into the junior administrative posts of the government.[18]

It is obvious that amid current conditions the United States needs to deal creatively with its problems of personnel in order to secure both the requisite numbers and the requisite quality. Because of the shortage of manpower and the general resistance of the people in many fields to entering the federal service, the Civil Service Commission found it necessary in April, 1948, to relax the merit system requirements and to return to wartime emergency measures in an effort to attract the thousands of new government people who had to be hired if the defense and recovery programs were to succeed.[19] Before the salary raises of 1949 were instituted, the government had similar difficulty in competing with business employers for the services of men in the higher brackets. In some instances President Truman attempted to fill top positions by transferring military men to civil positions permitting them, wherever possible, to retain the salaries attached to their military ranks which were usually substantially higher than the salaries paid for civilian services. He even attempted to secure Senate confirmation of a major general with a salary of $15,000 a year for the position of chairman of the Civil Aeronautics Board where the civilian salary was $10,000 a year, with the provision that the military salary was to be retained, but the Senate refused to aid in avoiding the salary limitation in this fashion.[20] The increasing use of military men in civilian positions brought a great deal of criticism merely on the score of the unnecessary

17. Forrestal, *op. cit.*, p. 50.
18. Frederick M. Davenport in a letter written as president of the National Institute of Public Affairs October 15, 1947. Mr. Davenport is chairman of the Civil Service Commission's Federal Personnel Council.
19. *Washington Post,* April 10, 1948.
20. The officer was Major General Laurence S. Kuter. See editorials, *Washington Post,* January 9 and 15, and *New York Times,* January 22, 1948.

UNITED STATES CIVIL SERVICE COMMISSION



enhancement of military power. The Secretary of Defense countered with the argument that critics

> ought instead to press for the practical measures that would develop general administrators within the civil service. The question is not whether the military program for developing top administrators is better than the civilian program. There is no such civilian program.[21]

Apart from the problem of inadequate civilian salaries in government at the top level, he explained as follows his contention that the military organizations are better equipped with skilled administrators than is the Civil Service.

> The Army, the Navy and the Air Force spend a great deal of time and energy in developing career officers for top positions. They rotate to give them experience in a wide variety of situations. They send many of the most promising to private universities for special courses of training in business administration, or finance and supply, or what not.
>
> A civilian program should obviously not merely copy a military pattern. But we need to build up in our civil service a systematic program to produce generalists, just as the Army and Air Force and Marine Corps produce general officers, and the Navy produces admirals.
>
> The Administrative internal program, which selects junior employees of unusual ability and gives them six months of training and assignments to develop their administrative ability, is relatively new. But its success at the junior levels shows what we could do to develop top civilian executives if we were only willing to take the necessary steps to do so.
>
> We ought not to try to develop all these talents within a closed government service. We need the interchange with business and labor and the professions and the universities. This will keep our Government aware of the outside point of view, and help prevent some of the bureaucratic traits which the British complain about in their own system.[22]

Organization for Personnel Administration. The President's Committee on Administrative Management contended in 1937 that the government's organization for personnel administration was obsolete and ought to be revised. It argued that for the purposes at hand the Civil Service Commission represented the wrong kind of organization and was inadequately staffed. The inadequacy of its staff had imposed upon the Commission a negative, protective, and legalistic role whereas the current need was for a positive, constructive, and active central personnel agency. While it did not voice the generalization which had been attributed to Woodrow Wilson that "all boards are long, wooden, and narrow," its argument was based on the assumption that board administrations tended toward negativism and passivity, whereas what was needed was a kind of positive leadership which could come only through top supervision by one man.

The Committee therefore recommended the replacement of the bi-partisan Civil Service Commission by a Civil Service Administrator who would

21. Forrestal, *op. cit.*, p. 51.
22. *Ibid.*, p. 51.

have the benefit of the advice in personnel matters of a non-salaried civil service board. Although the arguments of the committee were highly plausible, the recommendation was widely taken to be a concealed attack upon the bipartisanship of the Civil Service Commission and Congress refused to take the recommended action.

The Hoover Commission made no such drastic proposal as the abolition of the Civil Service Commission, but it did recommend that the administrative business of the Commission be concentrated in the hands of its chairman and that the chairman himself head a new office of Director of Office Personnel in the Executive Office of the President. It placed most of its emphasis on reorganization of the handling of personnel matters within the several departments and on the improvement of statutory and administrative regulations, rather than on fundamental changes in the top mechanism. Perhaps because its recommendations were not drastic, the Hoover Commission within a short time saw many of them put into effect, including its recommendation for the concentration of the administrative business of the Civil Service Commission in the hands of the chairman of the Commission.

The matter of effective personnel administration is not entirely one of form of organization. Forms are important, but by no means do they dictate absolute results. A bipartisan commission of three persons, provided that the three persons are keenly alive to personnel problems and are willing to collaborate toward a common end, can do a great deal toward improving the federal service. On the other hand, an administrator who proved lacking in administrative imagination or in ability to work cooperatively with the several departments and agencies might achieve nothing worthwhile. It is true that on few occasions has the board consisted of three persons all of whom have been highly competent and able and willing to cooperate effectively. There have been some extremely able appointees in recent years, as for example Leonard D. White and Arthur S. Flemming, but too often the offices have been looked upon largely as political rewards. Furthermore, too much of the negative atmosphere which was characteristic of the early years continues to prevail at a time when a much more creative attitude toward the functions of the commission is needed. It is an obvious fact that problems of personnel in the federal government are at once so vital and so volatile that a constant aliveness and constant adjustment of machinery and outlook to the problems are necessary if the problems are to be adequately solved.

References

Paul Appleby, *Big Democracy* (Knopf, 1945).
Jonathan Daniels, *Frontier on the Potomac* (Macmillan, 1946).
E. Pendleton Herring, *Federal Commissioners, A Study of Their Careers and Qualifications* (Harvard University Press, 1936).
J. Donald Kingsley, *Recruiting Applicants for the Public Service* (Civil Service Assembly, 1942).

Morris B. Lambie, *Training for the Public Service* (Public Administration Service, 1935).
Earl Latham, et al., *The Federal Field Service* (Public Administration Service, 1947).
Arthur W. Macmahon and John D. Millett, *Federal Administrators; a Biographical Approach to the Problem of Departmental Management* (Columbia University Press, 1939).
William E. Mosher, J. Donald Kingsley, and O. Glenn Stahl, *Public Personnel Administration* (Harpers, 3rd. ed., 1950).
Floyd W. Reeves and Paul E. David, *Personnel Administration in the Federal Government*, United States President's Committee on Administrative Management (Government Printing Office, 1937).
Herbert A. Simon, Donald W. Smithburg and Victor A. Thompson, *Public Administration* (Knopf, 1950).
Sterling D. Spero, *Government as Employer* (Remsen Press, 1948).
——— (ed.), *Government Jobs and How to Get Them* (Lippincott, 1945).
Leonard D. White, *Government Career Service* (University of Chicago Press, 1935).
———, (ed.), *Civil Service in Wartime* (University of Chicago Press, 1945).
Leonard D. White and T. V. Smith, *Politics and Public Service* (Harpers, 1939).

18

The Administrative Process

The last three chapters dealt with the executive branch of the government in terms of presidential leadership, departmentalization, and manpower. These topics are basic to any thorough discussion of the executive branch. Yet discussion of the three topics alone is not enough. Government is not government until it is in action. To mechanisms and personalities must be added the processes of getting things done. It is the function of this chapter to discuss important aspects of the administrative process, to get closer to a portrayal of the executive as a going concern. Unfortunately the types and range of executive and administrative activity are infinite in number and in their entanglement one with another, and they do not lend themselves well to classification and description. It is hard to separate one aspect of the administrative process from another without tearing the heart out of both.

Yet the very complexity of the process and the difficulty of understanding it makes it the more essential that we attempt to understand it. A nation which relies more and more heavily upon the activities of government cannot afford to bog down in a bureaucratic no-man's-land. It must know what it is doing, and the government in particular must know what it is doing, and why. So it is that during the last half century rapidly increasing attention has been given to methods of getting results through public administration. There has been public administration, of course, as long as there has been government. Yet the study of administration as a science is relatively new. Its canons are not yet fixed. The principles accepted by some practitioners as fundamental are treated by others as unimportant or erroneous. The character of the literature undergoes constant change. There is little resemblance between the writings of W. F. Willoughby a generation ago and the present day writings of such diverse authors as Paul H. Appleby, Arthur W. Macmahon, Fritz Morstein Marx, Luther Gulick, and Don K. Price. All these and many others have recorded keen insights, but neither individually nor collectively have they yet succeeded in coordinating a science. They have not even agreed on a professional vocabulary.

Since the fundamentals of public administration have not yet been agreed

upon by the specialists, this chapter will not attempt to define them or to present them in relations one to another which are assumed to be just the right relations. Rather, it will select certain aspects of the subject to illustrate its variety and importance. Beyond that, it will deal with administrators and administrative agencies not only as instruments for translating law into action but also as the makers of administrative law, a kind of law which both prescribes processes of administration and, in many instances, affects private rights.

PROBLEMS OF ADMINISTRATION

Relations Between Staff and Line. In January, 1950, the Department of Agriculture had approximately 75,000 employees, who were subject to the direction of the Secretary of Agriculture. He could, if he chose to take the time, follow out in completest detail the activities of any one of them. Unfortunately a day for him, as for his subordinates, has only twenty-four hours, some of which must be spent in sleep, travel, and various private activities. It is therefore physically impossible for him to watch the performance of any large number of persons. Yet he is supposed to determine or transmit from the President the policies and practices of the department in so far as they are not determined by statute, and when they are determined by statute it is his responsibility to see that statutes are obeyed. In December, 1939, Secretary of Agriculture Henry Wallace stated the problem as follows:

> Most administrators can keep in contact directly, effectively, and continuously, with not more than twenty men. If an administrator is to initiate effectively throughout an organization of thousands of men the impulses which are necessary to meet a new situation, he must do so for the most part through his staff or through the "generals" in his army. Only rarely and by the accident of a special situation can he come in effective contact with the captains, the lieutenants, or the privates in the army. Of course at times the special interests of an administrator will lead him to do a certain amount of "spot checking" among the captains and the privates, but it is physically impossible, as well as bad administration, to go so very far in this direction. It is only rarely that a $1,620 clerk is warranted in approaching a bureau chief directly. It is only rarely that the bureau chief is warranted in approaching the $1,620 clerk directly. A bureau chief is called in only rarely by the President. It is not often that a bureau chief feels he has the privilege of approaching the President directly. "Do your work, and send it through regular channels" seems to be the never-ending cry in government.[1]

Wallace here touches a number of problems in public administration. One is that of acting through a staff. It involves the distinction between staff and line, of which much is made by public administration experts. Who makes up the staff and who the line? The differentiation comes from the military. "Line" refers to the hierarchy of commanders who pass orders downward step by step to the people who do the manifold types of work

1. Henry A. Wallace, "Emerging Problems in Public Administration," *American Political Science Review*, vol. XXXIV (April, 1940), p. 218.

which administrative directions cover. The line may include, for example, the President, a department head, an assistant secretary, a bureau chief, and other intervening officers down to the person who manages the stenographic pool which does the mass of the typing for a department. The line, in other words, is the hierarchy of action people. As far as a particular task is concerned, the chain of responsibility may start not with the President but with the department head or with someone farther down the hierarchy who is responsible directly for the kind of work which the department, bureau, or subordinate agency is expected to do.

By contrast with line officers, staff officers acting in their staff capacities are not directly responsible for the operations of any agency. Their task is not to perform directly the work for which the agency is established but rather to perform auxiliary services and provide expert knowledge, information, and perspective so that the line officers whom they advise can better know what to do and how to do it. The distinction between staff and line is not always clear. Many officers at many levels perform both functions in varying degrees at the same time. A department head may at once constitute part of the President's staff, helping him decide what to do and how to do it, and serve as a line officer executing presidential orders or passing them along to the appropriate subordinate officers of the line. So it is at other levels of the administrative hierarchy.

Even if there is overlapping, however, the distinction between staff and line is still valid and important. While there can be no efficiency without proper performance by a properly constituted line, it is also true that without adequate staff the top commander will seldom know what orders to issue for transmission down the hierarchy. Although staff officers and services must be provided throughout most of an organization, the greatest need for staff is at and near the top. We have found that it is not enough to have a President of the United States. We must keep the President from getting lost in a chaotic world or suffocated by a bewildering bureaucracy. From the beginning we had to have something in the nature of a Cabinet to give him information and advice. Later, because of the limitations and inadequacies of the Cabinet as a staff organization, we found it necessary to create an Executive Office of the President for staff purposes.

In connection with the Cabinet as a staff organization, it was true as far back as the administration of Andrew Jackson that the President sometimes disregarded some members of his Cabinet as far as staff advice was concerned, relying instead on a group of informal advisers known as the "Kitchen Cabinet." Since the establishment of the Executive Office of the President during the administration of Franklin D. Roosevelt, the tendency has been to rely much more heavily upon members of the Executive Office than on the heads of certain departments. During most of the New Deal period the various people, with the exception of Harry Hopkins, who from time to time headed the Department of Commerce, were pretty much ignored in the making of over-all government policy. Hopkins, on the other hand, was likely to have great staff influence whatever his position or

whether or not he had an official position. The President's labor adviser within the Executive Office has usually been far more influential in making the labor policy of the administration than the Secretary of Labor. The Attorney General has from time to time been ignored in legal matters, the President's close advisers relying on their own legal judgment or on some subordinate official in the Department of Justice. The Solicitor General or an Assistant General has been known at times to sign documents as "Acting Attorney General" in spite of the fact that the Attorney General, in ignorance of what was going on, was in his office a few doors away. The point of all this is that the President seeks staff advice from the people whose judgment and good will seem to him most trustworthy. In general, however, the Executive Office provides a concentration of most such advice, with some of it coming even yet from the Cabinet.

The fact that members of the Cabinet and certain units within the Executive Office may have line functions as well should not be permitted to obscure the fact that their prime function as organizations is to help the President conduct the presidency. It is almost accurate to say that at times they *are* the President, operating in the President's name and not their own. They are his eyes and his ears, his storehouse of general knowledge, and his source of special information which no President should be expected to have in his own right, and at times they are virtually his brains, his reasoning powers for the making of critical decisions; yet the decisions must in the last analysis go through him and be expressed in his name.

Staff officers and services are provided in connection with line officers all down the hierarchy but in dwindling numbers. A department head is likely to need a great deal of staff assistance, the amount depending on the size of the department and the scope of its functions. The manager of the stenographic pool may require no staff assistance at all, and her immediate superiors may require very little. The amount increases as the level of supervision rises.

Hierarchy and Command. Since the conceptions of staff and line and of hierarchy of control were imported into civil government from the military, it is only natural that the importance of command and obedience should be somewhat exaggerated. Yet even the military have learned from hard experience that there are other and sometimes better ways of getting cooperation than merely by issuing orders and enforcing penalties to stimulate obedience. Neither in an army nor in a civil government are human beings mere cogs in a highly mechanized establishment. Something more than authority is required to get the desired results.[2]

Although that "something more" is hard to define, some of its elements can be distinguished. Prominent among them is the need for top leaders

2. On this subject see among others John M. Gaus, "A Theory of Organization in Public Administration," in John M. Gaus, Leonard D. White and Marshall E. Dimock, *The Frontiers of Public Administration* (Chicago: University of Chicago Press, 1936), pp. 66–91 and Egbert S. Wengert, "The Study of Public Administration," *American Political Science Review*, vol. XXXVI (April, 1942), pp. 313–22.

who can draw loyalty and support not only from their immediate subordinates but from far down the line. A good department head can lift the morale and improve the performance of employees whom he never sees except as he passes them in the corridors. In some way he gets down to them the impression that he is interested in their welfare, that he appreciates their efforts, and that he likes engaging with them in a common cause. By contrast, a top executive who does not know how to lead or does not care for leadership can impart a chill to his entire department. Those of his employees who have to see him, defer to him in his presence and then dodge out of his way, to gossip about his idiosyncracies or to complain about his egotism, his ignorance, and his errors. For some reason which he is unable to understand, work seldom gets done on time, or if it is done on time it is with irritating frequency not done exactly as desired.

The problems of good relations are by no means always those of relations between superiors and subordinates. An officer may be popular as far down the line as he can make his influence felt, and yet may fail to bring about cooperation between bureaus in different fields which operate at the same level one with another. In connection with the statement quoted above, Henry Wallace as Secretary of Agriculture added the following:

> One of the chief sources of inefficiency in Washington is the failure to develop for the higher executives sufficiently strong staffs to bring about genuine coordination of the bureaus in the service of broad policy. Contrary to popular impression, the bureaus as a rule are genuinely efficient. But oftentimes they are somewhat lacking in the comprehension of their relationship to matters of broad policy. It is here that the staff arm of a department or an office can render unusual service.[3]

Although the President is head of the entire administration, bitter rivalry sometimes develops between departments. Such rivalry may be generated by the personalities of the top leaders or it may represent the culmination of interdepartmental friction over many years. Departments and bureaus have been known to hoard in secret for their own use supplies for which they had no immediate need but which were badly needed elsewhere. It was frequently remarked during the course of World War II that some government agencies would be even less willing to give important information to competing agencies than to the enemy. Such situations are perhaps unusual rather than typical. There is, as there must be, an enormous amount of cooperation among agencies at all levels. Yet the development of friction and inter-agency warfare is serious enough to call for constant watchfulness and such preventive measures as are possible. The problem calls quite as much for an art as for a science of administration.

At other points it is emphasized that administration is not a simple matter of looking to staff for judgment and to line for action. Although a government department is not an organism in the biological sense, adequate

3. Wallace, *op. cit.*, p. 218.

performance of the whole requires use of the accumulated knowledge of all the parts. While it is possible for command to make itself felt all the way from the top to the lowliest subordinate, it is much more difficult for the aggregate of workers to transmit backwards to top leaders and top staff the information and understanding which are accumulated through day-to-day activities. Relations between subordinates and supervisors and between line workers and staff need to be such that the experience acquired in actual operations will be garnered and utilized for the benefit of the departmental program. Although the solution is partly a matter of machinery, it is so largely a matter of human qualities that generalization about it is next to impossible.

Lines of Authority. Although relations between superiors and subordinates are not exclusively those of command and obedience, administration requires that, to the fullest extent possible, lines of authority be clearly drawn. All workers at all levels need to know from whom they are obligated to take direction and from whom they may seek advice. They need to know also to whom they may or must give directions and advice. It is not necessarily bad administration to require a worker to take directions on one subject from one person and on another subject from someone else, but efficiency will be impaired unless he knows at all times to whom he is responsible. Few experiences are more disastrous than having orders given by one person and countermanded by another. It wrecks the morale both of the competing workers and the competing supervisors.

Conflict of jurisdiction over subject matter is also a potent source of friction and ought to be eliminated wherever possible by clear directives. The country has nothing to gain by a struggle between top agencies for the privilege of doing the same job. As a rule top administrators have nothing to gain by it either, and they oftentimes have much to lose. On occasion, however, administrators have been accused of deliberately creating overlapping jurisdictions so that ambitious subordinates might fight each other to a standstill and by using up their predatory energies in this fashion become less dangerous as political rivals of their superior. The game was one which President Franklin D. Roosevelt was sometimes suspected of playing. It had no justification in terms of sound administration, however well justified it might be in terms of the very different principles of politics.

It has often been contended that the form of organization at the intermediate level should be determined in part by whether the principal goal is deliberation or action. It is contended that if the principal service is to attempt to discover all the facets and ramifications of a problem, the top organization of an agency ought to consist of a group of equals, save for the necessity that some member of the group must act as chairman or presiding officer. On a level of equality all will feel an equal right to discuss the problem as they see it, so that by discussion it will be brought out in full relief. On the other hand, the argument runs, if the principal aim

is action, then the board form of organization is not the best. The tendency of a board is to talk endlessly instead of acting. To secure action it is better to have an administrative head with a staff which he can consult but does not have to satisfy before he can act. As was indicated in the preceding chapter in the discussion of the Civil Service Commission, these generalizations are not as universally valid as they were once assumed to be. Even so, they are not entirely without point. Out of recollection of bitter experience as chairman of the three man board of the Tennessee Valley Authority, Dr. Arthur E. Morgan urged Congress to abolish the board and replace it by an individual who would have freedom as an administrator but would be subject to some kind of continuing review.[4] The principle of providing boards for deliberation and administrators for action has been extensively observed in the federal government in recent years.

There is a reason for resorting to administrators for action quite apart from the efficiency of the organization itself. A board lodged within the hierarchy of authority is much harder to control from above than is an administrator. The superior officer finds it hard to locate the center of responsibility in a board and to require that action be taken. Whereas a board can often shift from one of its members to another the responsibility for inaction, it is much easier to keep the spotlight on an administrator and to hold him responsible either for inaction or wrong action. Because responsibility is so easily fixed, it is politically more feasible to remove an administrator for malperformance or nonperformance than to remove all the members of a board among whom the responsibility appears to shift from hand to hand so that it can never be definitely located.

Responsible administration can be disrupted by an independent board or commission which owes no obedience to a higher officer and cannot be removed by the President but has jurisdiction of widely overlapping subject matter for which the President or an administrative agency has extensive responsibility — as when the jurisdiction of the National Labor Relations Board overlaps that of the Department of Labor. Such a board can wreck the symmetry of administration and disrupt the President's program. On this basis the independent regulatory commissions were criticised in the 1937 report of the President's Committee on Administrative Management, and it was recommended that as many as possible of their non-judicial functions be stripped from them and transferred to responsible agencies within the administrative hierarchy. Within the range of its assumptions, the logic of the committee was sound. The point was well illustrated by President Roosevelt's unsuccessful attempt to remove William E. Humphrey from the Federal Trade Commission in order to secure administration of that commission more in harmony with his own program. Humphrey, a Coolidge-Hoover Republican with avowedly conservative views, could not be expected to regulate business in a manner harmonious with the program of the New Deal. If there was to be harmony of program it was necessary that at least a majority of the members of the Fed-

4. *Washington Post*, March 20, 1948.

eral Trade Commission should see eye to eye with the President on matters of major policy.

The Hoover Commission deplored the fact that "The line of command and supervision from the President down through his department heads to every employee, and the line of responsibility from each employee of the executive branch up to the President, has been weakened, or actually broken, in many places and in many ways." [5] Whether fortunately or unfortunately, neither Congress nor the people are as much concerned about symmetry in organization as are experts in public administration. When Congress gives broad powers, as it did for the New Deal program, it likes to preserve anchors to the windward. The idea of restraint upon authority is deeply implanted in American political thinking. On the one hand, in a time of crisis Congress or the people could hear with equanimity a remark or argument such as the following, which was attributed to Vice President Garner:

> The President has been given dictatorial powers to straighten out the banks. He has been given dictatorial powers over wages of government employees and veterans' benefits. Why should he not also have dictatorial powers to help the farmers? [6]

On the other hand, Congress and the people could likewise react with seemingly inconsistent indignation at any attempt to encroach upon the obstructive authority of independent regulatory commissions which were traditionally immune from presidential control.

However much or little it may be justified in a particular instance, the popular distrust of dictatorial rule must always be taken into account by those who plan shifts in existing allocations of power. Some of the independent regulatory commissions have become large and influential institutions. It is hard to tell whether in the interest of symmetry in public administration many of their powers ought to be stripped away and allocated to agencies responsible to the President, or whether the emphasis ought to be placed upon a maximum of voluntary cooperation where cooperation cannot be coerced by the President. As has already been indicated, command alone is not enough to secure efficient governmental action; there must in addition be mutual respect and enthusiasm for a common cause. True, there are times when it is necessary to issue and enforce orders. This the President cannot do with respect to the independent regulatory commissions. The fact remains, however, that most of the commissions are agencies with traditions of faithful performance in the public interest and that much of their prestige derives from such performance. Congress could abolish any or all of them at any time. It could strip them of any or all of their powers. They are subject, therefore, to a kind of coercion even though the President without the support of Congress is not in a position to exercise authority over them. The fact that Congress

5. *First Report*, House Doc. No. 55, 81st Cong., 1st sess., pp. 3–4.
6. *New York Times*, March 21, 1933.

has protected many of them against executive reorganization suggests that their operations are not completely out of line with congressional and popular policy. Although there is lack of symmetry in administration through independent regulatory commissions, the long range lack of symmetry, now that much commission administration has been centralized in the chairmen, may be little greater than that found in various executive departments.

Deference to Authority. A major difficulty in describing public administration is that much of it is so intangible. It is hard to isolate its principles, and often these seem little more than the instinctive dictates of common sense which an administrator either has in his own right or is unable to learn from any amount of study. Illustrations can be taken from the memoirs of Winston Churchill. Early in World War II, when Churchill was First Lord of the Admiralty under Prime Minister Neville Chamberlain, he was careful to keep Chamberlain thoroughly posted on Admiralty matters by a series of private letters. His purpose was to educate Chamberlain and win him over in private before he could be driven to take publicly any position which, because it had been publicly taken, he would be inclined to adhere to. Said Churchill, "I did not wish to be drawn into arguments with him at Cabinets, and always preferred putting things down on paper." [7]

Churchill saw the principle involved as one which ought to apply to the entire War Cabinet. He wrote, as follows:

> The War Cabinet was hampered somewhat by the fact that they seldom sat together alone without secretaries or military experts. It was an earnest and workmanlike body, and advantages of free discussion among men bound so closely together in a common task, without any formalities and without any record being kept, are very great. Such meetings are an essential counterpart to the formal meetings where business is transacted and decisions are recorded for guidance and action. Both processes are indispensable to the handling of the most difficult affairs.[8]

Churchill showed clearly that amid the crises of war it is sometimes impossible for a top administrator to delegate to a subordinate the authority which can be delegated in normal times. Chamberlain asked Churchill as First Lord of the Admiralty and as the senior Service Minister to preside over the Military Coordination Committee, which consisted of the several Service Ministers and their professional chiefs. In the pre-critical period of making and coordinating military programs, this worked well. With the beginning of the Norway campaign, however, the situation changed. Whereas previously coordination had been worked out with great mutual consideration, "the actual conflict had to be more like one ruffian bashing the other on the snout with a club, a hammer, or something better." [9] The

7. Winston S. Churchill, *The Gathering Storm* (Boston: Houghton Mifflin, 1948), p. 452.
8. *Ibid.*, p. 452.
9. *Ibid.*, p. 587.

atmosphere of the campaign worked its way into the Military Coordination Committee. So great was the tension that Churchill found it necessary to ask Chamberlain himself to preside, not because of Chamberlain's superior ability but merely because of the prestige of his higher office.

These are but samples of the multitude of illustrations to be found in the memoirs of one-time administrators which show the variety and in a sense the formlessness of the administrative process. Students of public administration are constantly attempting to distill principles of administration out of administrative experience.[10]

Among the lessons learned through operating our federal government during World War II was the fact that many business men who became government executives during the war had a common deficiency. They lacked adequate appreciation of the special characteristics and problems of public administration and adequate knowledge of the interrelations among the several departments and agencies. It has been said that:

> The American business man, whether he goes into Government service or exercises his right as a citizen to criticize it from outside, needs to remember several things. Here are a few of them:
>
> (1) In business, profit and loss are the criteria of success. In Government, your rewards for successful work are much less tangible. They come from the inner satisfaction of taking part in the most important and powerful and complicated team in the world, and not from individual compensation.
>
> (2) The essence of the American Government is distribution and balance of power. The top officials in the Executive Branch are agents of the President, but they have to work with and through Congress.
>
> (3) A business administrator can prove he is a success by showing a sound balance sheet and a favorable income account. It is not so simple as that in government. First you have to do a good job, then you have to convince the Congress and the public that a good job is being done.[11]

Administration and Representation. According to the original theory of our government, the people are represented in the government only through the process of electing officers. In that sense the only representatives of the people are members of Congress and the President and Vice President. Facts about government, however, have a way of deviating from theories or of compelling them to change. Relations between the government and the people are now such that large numbers of persons within the executive branch have come to think of themselves both as more representative of the people and as serving the interests of the people better than many members of Congress. The situation has come about in part through the fact that Congress is to a considerable extent the product not of direct popular action but of the manipulation of party machines. The majority in Congress, furthermore, from time to time falls victim to well-organized minority pressures.

10. See Luther Gulick, *Administrative Reflections from World War II* (University: University of Alabama Press, 1948), Chapter IV.

11. James V. Forrestal (with the assistance of Don K. Price), "If the U.S. is Really to Do a Job —," *New York Times Magazine*, May 9, 1948, pp. 7, 48.

The executive branch, it is true, is also responsive to the will of pressure groups. Indeed it is partly on the basis of such responsiveness that administrators lay claim to classification as democratic agents. Because they do not have to come up periodically for re-election, administrators at the middle levels of the executive branch feel that they can and do develop a far higher degree of professionalization and of adherence to professional standards than is possible either among members of Congress or at the top levels of administration. So it is that the higher civil service administrators in the Department of Agriculture can go on year after year working cooperatively with farm groups throughout the country and serving the interests of farmers without having figuratively to "sell out" from time to time to some powerful group which otherwise would bring about their defeat at the polls. So it is also, however, that local agents of Washington offices are persistently able to impress agency policies on local communities whether or not those policies are locally welcomed.

In many departments and agencies professional administrators work in the public interest, as they interpret that interest, with obvious zeal for the public welfare. They are self-effacing, honest, and diligent. They have no high personal aspirations to office or honors or compensation. They ask for nothing but the privilege of doing their work as well as possible and of improving the operations of government so that the public may be more adequately served. They know their specialties as no member of Congress can ever find time to know them. Where their specialities call for extensive operations at points distant from Washington, as in much of the work of the Department of Agriculture, the Department of Commerce, and the Department of the Interior, they often have access to information superior to that of congressional representatives from the areas involved. They know just what ought to be done to eradicate insect pests in a particular area, to promote American business of a particular kind, and to bring about the drainage or the irrigation of particular swamp or arid lands. They maintain extensive contacts, furthermore, with the people whose welfare depends on the solution of these problems. Although it is difficult to get revealing figures distinguishing between Washington and non-Washington government employment, a high percentage of government employment is outside Washington and adjacent centers — it is in what is called "the field." Not all of the field services, it is true — as witness the offices of the Collector of Internal Revenue — are responsive to the desires of local people. Some for obvious reasons ought not to be so responsive, yet large numbers of them should be and are. Farmers affected by the Soil Conservation Service of the Department of Agriculture may be able to influence the service much more effectively through their direct contacts with it than through their pressure upon members of Congress, who prescribe and appropriate money for the operation of the department.

With a great deal of administration, influence flows along both channels. Pressure groups operate at the same time upon Congress and upon the administrative agencies. The American Farm Bureau Federation, the National

Association of Manufacturers, and the American Federation of Labor seek to influence both Congress and the administrative agencies. At the presidential level and at the level of top political appointments, political survival may depend on the skill of the administrator in dealing with powerful pressure groups. The civil service personnel just below him must yield somewhat to the pressure bearing upon the politically appointed administrator. Yet permanent professional employees can to some extent resist anti-social political pressures and can also somewhat bolster political superiors who are interested in good government as distinguished from the rewards of political expediency.

It is the influence of this middle group of civil servants which during the past generation has created the impression that good government is much more likely to come from the efforts of the administrative side of the government than from Congress. For the short run, this impression may have a great deal of validity. Administration in the mass is relatively new. The standards of professionalization are new and rather high. The influx of new personnel in recent years has been so great as to promote drastic modification of such traditions as administration has developed. Congress, on the other hand, is much more the institution it was a century ago. It is bound by the traditions and methods of political partisanship. It conducts itself altogether too much as it did when civilization extended itself but thinly beyond the Mississippi River and when the economy was largely agricultural and legitimately pretty much one of *laissez faire*. The implications of all this, however, are not necessarily that the country should be run more and more by administration and less and less by act of Congress. Relations with the pressure groups which operate both upon Congress and upon administration provide no adequate substitute for the elective process.

It seems obvious that our party mechanisms and, more important, our traditional ways of thinking about party matters and political representation, need to be drastically overhauled. Both Congress and the people who elect it need to develop a conception of high policy to be made by high-minded and well-trained legislators who can both express and guide the thinking of the American people about major national problems. The problem of inadequate congressional performance is not to be solved merely by reliance on high-minded professional administrators however well the latter may perform their specific tasks. Good administrators are invaluable to the extent of their specialized knowledge and competence. They render services which even the best of Congresses could not possibly take over. Yet trained administrators are not in general equipped to take over the functions of major policy and the relation of government program to the general welfare which ought to come under the jurisdiction of an imaginative and highly competent Congress. It is an important fact, furthermore, that the most effective control of the people over their government is through the elective process. It cannot safely be assumed that administration will always be in the hands of intelligent, high-minded, and self-effacing administrators. Tyranny is by no means unknown to government bureaus. To surrender to non-elective administrators the making of major governmental

policy is to surrender to despotism, however high the standards of that despotism may be and however little of a despot the administrator may consider himself or aspire to be. For a penetrating appraisal of despotism even at its best, we may well go back to John Stuart Mill.

> A good despotism means a government in which, so far as depends on the despot, there is no positive oppression by officers of state, but in which all the collective interests of the people are managed for them, all the thinking that has related to collective interests done for them, and in which their minds are formed by and consenting to, this abdication of their own energies. Leaving things to government, like leaving them to providence, is synonymous with caring nothing about them, and accepting their results, when disagreeable, as visitations of Nature.[12]

Administrative Reform. Nothing said herein is intended to imply that the struggle toward administrative efficiency can be abandoned while we are attempting to do something about Congress and political parties. Year by year the administrative task grows heavier and more complex. We need more and better administrators and better mechanisms of administration. The complications of the tasks to be performed oftentimes seem to invite the creation of bad machinery. In the summer of 1947, for example, Congress passed an act to create a national science foundation. The purpose was to facilitate scientific development in the United States by a measure of government supervision and finance without at the same time getting scientific matters tangled with politics. The foundation was to be headed by a director, who was to be immunized against political influence by a mode of appointment which largely prevented control over him by the President. He was to be appointed by a nine member executive committee of a twenty-four member committee. The twenty-four member committee was to meet only once a year; the nine member executive committee would be required to meet only six times a year, yet this body was both to choose the director and prescribe his duties. Even though it took three years to secure enactment of a more satisfactory measure, the President quite properly vetoed the bill because it created an anomalous institution within the administrative hierarchy which would be able pretty much to go its own way without regard to the President's policies or the operations of other parts of the administration.[13]

In addition to major mechanisms it is necessary also to give constant attention to matters of "red tape." Red tape is the product of the care necessary to prevent mistakes. It takes constant vigilance to see that governmental machinery does what it is intended to do and that it does not do what it is not intended to do. Yet exaggerated watchfulness and excessive safeguards may defeat the purpose of the conscientious administrator.[14]

12. John Stuart Mill, *Considerations on Representative Government* (New York: Henry Holt, 1875), p. 59. For further discussion see Carl B. Swisher, "The Post-War Constitution," *Boston University Law Review*, vol. XXVIII (April, 1948), pp. 113 ff.

13. For the veto message see *Congressional Record*, February 24, 1948, vol. 94, part 9, pp. A1087–89.

14. See for example an account of the thirty-five steps involved in the handling of an ordinary letter received by the Department of State, *Congressional Record*, March 3, 1948, vol. 94, part 2, p. 2066.

ADMINISTRATIVE LAW

Government by Directive. Part of the administrative process is the process of making, applying, and enforcing what is loosely called administrative law. Administrative law has no clear and sharp definition. Just as statute law includes both public and private law, so administrative law includes both law which has to do only with the operations of government agencies and personnel and that which affects private rights. It sometimes seems that the major distinction between statute law and administrative law is that the one is made by Congress and the other by administrators or administrative agencies. In actuality, administrative law, however great in scope, is a subordinate kind of law which derives its potency either from acts of Congress or from powers which the Constitution vests in the President.

The volume of administrative law is enormously greater than that of statute law. The great mass of it is assembled in what is known as a *Code of Federal Regulations*, which is organized after the fashion of the *United States Code*.[15] Something of the difference in bulk can be indicated by the fact that whereas the 1946 edition of the *United States Code*, which includes all now effective statutes enacted by Congress from 1789 to 1946 inclusive with index runs to only 8,043 pages, the material in the supplement to the *Code of Federal Regulations* runs to 7,862 pages for the year 1946 alone. Many acts of Congress, it is true, wield or convey tremendous power in a relatively few words, whereas many of the units of administrative law deal in extreme detail with what sometimes seem minor matters.[16] Even so, the volume of administrative law indicates something of the extent of administrative preoccupation with rules and regulations which in the mass never meet the congressional eye or the eye of the general public.

The great mass of the orders and regulations issued in the executive branch of the government and having the force of law first makes its appearance in a daily publication called the *Federal Register*, which closely resembles the daily issues of the *Congressional Record*. It is the function of the *Federal Register* to make this subject matter available to those government agencies and private individuals who find it necessary to keep up with administrative law in some particular field or to find the law on some particular subject. The documents included therein are cited by volume and page as are laws in the *United States Statutes At Large*. Executive Orders of the President, furthermore, carry numbers by which they are identified. Thus an order of the President, dated January 17, 1948, "establishing air space reservations over certain facilities of the United States Atomic Energy Commission" is included in the *Federal Register* for January 20, 1948, where it is entitled Executive Order No. 9925 and from which

15. For discussion of the *United States Code*, see Chapter 9. While some of the materials included in the *Code of Federal Regulations* can with difficulty be classified as administrative law, the mass of it can be so included.

16. A newspaper commentator notes that twenty-one words in the Fair Labor Standards Act were built up with 1,200 words of definitions and administrative regulations. — Baltimore *Sun*, February 12, 1950.

it is to be correctly cited as 13 F.R. 251 — that is, volume 13 of the *Federal Register*, page 251.

Defining the Powers of Government Agencies. Examples of administrative law which closely resemble the public law statutes enacted by Congress are provided by the directives issued by the President and by other high officials defining the jurisdiction of agencies subject to their direction. The activities of any government agency which wields considerable power tend to encroach upon the jurisdiction of large numbers of other agencies. It is the tendency of each agency to hold all the jurisdiction that has been conferred upon it, and if possible somewhat to expand that jurisdiction. Because situations are constantly changing and because the functions of agencies are constantly being seen in new lights, it is necessary from time to time to redefine agency jurisdictions and their relation one to another. This is particularly true in connection with wartime activities and other kinds of emergency activities where the pattern must remain unsettled. Under these circumstances the agencies involved are kept under control and kept from wasting all their energies fighting one another by the periodic redefinition of their authority, either by the President or by some subordinate official who has jurisdiction over all the contending factions.

Major readjustments of authority among government agencies are likely to be made by the President, with or without the support of acts of Congress. An example is provided by Executive Order No. 9686, which was issued by President Truman in January, 1946.[17] The purpose of the order was to speed the construction of housing for veterans. It prescribed certain powers and duties for an officer known as the Housing Expediter, who was then in the Office of War Mobilization and Reconversion. It is presented here not as part of a study of public housing but as an illustration of problems of administrative law. In the following language the order gave the Expediter broad jurisdiction:

> Issue such orders, regulations, or directives to other executive agencies as may be necessary to provide for the exercise of their powers in a manner required by or consistent with the execution of the aforesaid plans and programs, and to coordinate the activities of such agencies directed to the execution of such plans and programs. Each executive agency shall carry out without delay the orders, regulations, or directives of the Housing Expediter and shall, to the extent necessary, consistent with governing statutes, modify its operations and procedures from time to time to conform to the directions of the Housing Expediter.

Further to emphasize the intentions of the President, the order provided that:

> The executive agencies of the government shall exercise their emergency powers and other powers for the purpose of aiding in the solution of the problems created by the existing housing emergency, the alleviation of which is vital to an orderly transition from war to peace.

17. 11 F.R. 1033.

It is said that Wilson Wyatt, who came to Washington at that time to fill the office of Housing Expediter, felt that this executive order coupled with the personal assurance of the full support of the President would give him all the support he could possibly need in the exercise of his duties. People better informed about the ways of Washington agencies, however, urged him to get the maximum legal authority into his own hands while he still had bargaining power, reminding him that he could not go running back to the White House every day for support in his competition with other officers and agencies.[18] In spite of Wyatt's expressed lack of interest in additional authority, Congress, in enacting the Veterans' Emergency Housing Act of 1946, provided that authority in giving a statutory base to the office. Furthermore, it transferred to the Housing Expediter such jurisdiction as he needed from the Office of War Mobilization and Reconversion in which his office had been located. In addition, Congress incorporated in the statute itself that portion of the Executive Order which authorized the Housing Expediter to issue orders to other executive agencies and added specifically the statement that the Office of Economic Stabilization and the Office of Price Administration were included. The statute incorporated also the provision that each executive agency should carry out without delay the orders, regulations, or directives of the Housing Expediter.[19]

Thus doubly armed with power from the President and from Congress, it seemed that the Housing Expediter was well equipped to do all that could be done to speed the construction of houses in spite of the rival jurisdictions of other agencies and the possible obstruction of private interests. The Expediter issued directions to many other government agencies and saw many of them obeyed with alacrity. Some of the steps it is said would have been taken by the agency in question in any event, and on occasion such directives were welcome because, in cases of doubt, the responsibility for action fell upon the Housing Expediter rather than upon the agency by which the directed action was taken.[20] Yet there were also difficulties. For example, while the Office of Price Administration was in full sympathy with plans for the construction of low-priced housing, it had developed its own standards of price control and was reluctant to obey the orders of the Housing Expediter to increase prices in order to facilitate construction. When the Housing Expediter asked for an increase in the price of nails because of a shortage in supply, the Office of Price Administration argued that instead of raising the price the Housing Expediter ought to direct the Civil Production Administration to turn more raw materials into the manufacture of nails. The Housing Expediter had authority to issue directives to both agencies, but no standards were prescribed by which he was to determine through which agency he would get the overall results he was working for.[21]

18. For discussion of this and other aspects of the subject see Joseph L. Rauh, Jr., "Government by Directive — A Case History," *Harvard Law Review*, vol. 61 (November, 1947), pp. 88–111.

19. 60 Stat. 208.

20. Rauh, *op. cit.*, pp. 91–92.

21. *Ibid.*, p. 94.

In spite of the breadth of his grant of power, the Expediter had difficulty getting results in other areas. He walked on delicate ground when he sought from the Office of Defense Transportation assistance in getting housing materials shipped in advance of other materials for the delivery of which purchasers were clamoring. The Reconstruction Finance Corporation was not accustomed to bowing to the will of any outside agency in deciding on the allocation of loans and was in no hurry to do so for this one. The policies of the War Assets Administration in liquidating government property did not always conform to a program which made low cost housing the prime consideration. The experiences of the Expediter led a careful observer to conclude that "the directive authority of one agency will not be successful against the determined opposition of another agency except with the complete support of the President." [22] In areas of agency conflict, private interests add to the problem by supporting rival agencies, as when in this instance an automobile plant wanted for its own purposes a steel plant which was needed for housing construction.

In spite of the difficulties involved in the enforcement of administrative orders, however, even when based upon acts of Congress as well as upon presidential directives, it is through the process of issuing and executing such orders that much of the work of the government is carried on. The device never works perfectly, but without some such process of delegating authority the government could not work at all. Without the prescription of definite rules of action there would be chaos. The difficulties are not so much difficulties of method as unavoidable results of the fact that government operates in the midst of a flow of conflicting pressures which have their impact on every government program.

Directives as to Procurement. The use of directives to promote government efficiency is further illustrated by an order issued in 1948 by the Secretary of Defense to consolidate in the Munitions Board a great deal of authority for the procurement of supplies for the armed forces.[23] Procurement is always one of the important problems of public administration. In the past, many different agencies have made their own purchases. They have bought in competition with one another, often selecting materials unwisely; and they have to some extent failed to get the benefits which come with planned purchasing for an entire establishment. The problems have been peculiarly great where, as with the purchases of the military departments, both the needs and the supplies vary tremendously from situation to situation. The directive mentioned was intended to give the Munitions Board power to eliminate such competition as remained between Army, Navy, and Air purchases and to provide for better procurement of supplies in the event of war. Said a commentator, "some 22,000 plants now are being studied so that the Munitions Board can definitely assign to each of them its initial wartime task, thereby eliminating scrambles by Army, Navy, and Air for special — and costly — attention. The new grant of con-

22. *Ibid.*, pp. 109–10.

23. Baltimore *Sun*, June 20, 1948.

centrated authority will presumably hasten the work of this industrial survey." [24]

Administrative Law and Private Rights. Although any administrative order, like any public law statute, may have an ultimate impact upon private individuals, the illustrations given above are to be differentiated from the kinds of administrative law which bear directly on private rights. In the language of the Supreme Court, "Multiplication of federal administrative agencies and expansion of their functions to include adjudications which have serious impact on private rights has been one of the dramatic legal developments of the past half-century." [25] In a report published in 1941, a group known as the Attorney General's Committee on Administrative Procedure found that agencies within nine of the major departments and nineteen other agencies either made rules of this kind, made decisions under such rules which affected private rights, or both made and enforced such rules.[26] Thus the Interstate Commerce Commission decides what rates can be fairly charged on railroads and then sits as a kind of administrative court to determine whether its rules have been violated. Again, when Congress has by statute given certain rights to veterans, the Veterans' Administration prescribes rules for the distribution of veterans' benefits and renders decisions on doubtful issues. The Passport Division of the Department of State makes rules and regulations to carry out the will of Congress with respect to passports for foreign travel and, under the rules, decides whether or not passports shall be granted to particular applicants. The Wage and Hour Division of the Department of Labor both works out and applies rules for administration of the Fair Labor Standards Act.

Agencies which perform in this fashion to some extent merge administrative, legislative, and judicial powers, powers which according to the traditions of our government should be separate. Furthermore, the authority of those agencies which are classified as independent regulatory commissions is the greater because the terms of their members do not correspond to the President's term of office and his removal power over them is limited. The defenders of administrative rule-making and administrative justice contend that under many kinds of circumstances more adequate justice can be done through administrative agencies than merely through enforcement of detailed acts of Congress in the courts. They contend that detailed rules applying law to facts need to be made by people who know the fields of regulation far better than members of Congress can ever know them. Furthermore, the rules must be subject to change as circumstances change, with a speed not possible in Congress, as when rates must be adjusted to changing price levels. As for the judicial end of the process, they contend that if decisions are to be fair, they must be made by people who know both the intricacies of rules and regulations and the situations to which

24. Mark S. Watson, *ibid.*
25. *Wong Yang Sung* v. *McGrath,* 70 S. Ct. 445, 448 (1950).
26. *Administrative Procedure in Government Agencies,* Senate Doc. No. 8, 77th Cong. 1st sess., pp. 3–4.

these are applied. Such specialized knowledge is not possessed by occupants of the bench who must be ready at all times to decide questions coming from all sectors of the legal field.

The growth of administrative justice has in recent years proceeded at a rapid rate, though in the face of constant criticism of it as bureaucratic dictatorship from the private interests affected and from the bar. The American Bar Association and other organizations have demanded reforms requiring maximum uniformity in the procedure of the several agencies, the separation of prosecuting and judicial functions in those agencies, and maximum judicial review of all administrative decisions. The defenders of the agencies have contended that procedure ought not to be uniform among the several agencies but ought to be adjusted to the varied tasks the agencies perform. They have shown less opposition to the separation of the several functions within each agency and have indeed been inclined voluntarily to establish such arrangements. They have opposed the extension of judicial review over their proceedings, contending that most of the purpose of administrative agencies would be defeated by judicial review, with its inevitable delays and inevitable misunderstanding by unspecialized judges.

As a compromise between critics at the two extremes, Congress in 1946 passed what is known as the Administrative Procedure Act.[27] This statute attempted to bring about as much order as possible in administrative procedure without seriously hampering the agencies. It attempted throughout to balance the provision of safeguards with the maintenance of flexibility in administration. It prescribed conditions for administrative exercise of the rule-making power. It took steps toward separation of rule-making and adjudicative functions within the same agency. It prescribed to some extent the conditions under which rules were to be made and decisions were to be handed down. It prescribed conditions under which persons whose rights were involved should have the right of judicial review, without so extending that right as completely to defeat the efforts of the administrative agency. What the statute will mean in terms of actual practice remains to be seen in the years immediately ahead.

Perhaps the most significant aspect of the development of administrative procedure is the attempt to preserve the benefits of the separation of powers without so far separating the three groups of powers as to confine them respectively to the legislative, executive, and judicial branches of the government. Although the Constitution grants all legislative power to Congress, experience, as noted above, has shown the necessity of lodging subordinate rule-making power in agencies much more flexible and having much more expert knowledge than Congress can be expected to possess. Although the Constitution allocates the judicial power to the judicial branch of the government, experience has likewise demonstrated the need for making certain kinds of decisions through agencies having kinds of expert knowledge which the courts do not possess and able to operate without some of the procedural restrictions deemed necessary to insure adequate justice in

27. 60 Stat. 237.

the courts. As for executive power, many of the agencies are lodged within the executive branch of the government, but others are given a measure of administrative power even though they are largely removed from the jurisdiction of the President.

Such a mixing of the traditionally separated powers in individual agencies does not promote symmetry in government, but government does not exist for the purpose of achieving symmetry. Its function is promotion of the public welfare. The problem is to adjust governmental machinery for the performance of whatever tasks must be performed, without at the same time abandoning safeguards which are necessary to protect the people against governmental abuse. The growth of administrative procedure has marked to some extent the abandonment of the principle of the separation of powers, but with the reservation that the legislative power of Congress can be delegated only when adequate standards are prescribed by Congress for the guidance of rule-making agencies.[28] Congress lays down general principles and administrative agencies implement these principles by drafting and periodically amending technical rules, subject to the procedure laid down in the Administrative Procedure Act. The same act gives protection against the dangers of allocating adjudicative powers to administrative agencies, both by placing restrictions on procedure and by reserving the right of judicial review of administrative decisions which involve questions of procedure or law. Further discussion of this subject, however, must await a more extensive discussion of the judicial branch of the government in the chapters immediately ahead.

References

Paul H. Appleby, *Policy and Administration* (University of Alabama, 1949).

Attorney General's Committee on Administrative Procedure, Report, 77th Cong., 1st sess., Sen. Doc. 8 (1941).

F. F. Blachly and M. E. Oatman, *Administrative Legislation and Adjudication* (Brookings, 1934).

———, *Federal Regulatory Action and Control* (Brookings, 1940).

Milton M. Carrow, *The Background of Administrative Law* (Associated Lawyers Publishing Co., 1948).

Joseph P. Chamberlain, Noel T. Dowling and Paul R. Hayes, *The Judicial Function in Federal Administrative Agencies* (Commonwealth Fund, 1942).

John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (Harvard University Press, 1927).

Ernst Freund, *Administrative Powers over Persons and Property* (University of Chicago Press, 1928).

John M. Gaus, *Reflections on Public Administration* (University of Alabama Press, 1947).

John M. Gaus, Leonard D. White, Marshall E. Dimock, *The Frontiers of Public Administration* (University of Chicago Press, 1936).

Walter Gellhorn, *Federal Administrative Proceedings* (Johns Hopkins Press, 1941).

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28. See, for example, Louis L. Jaffe, "An Essay on Delegation of Legislative Power," *Columbia Law Review*, vol. 47 (April, July, 1947), pp. 357–76, 561–93.

W. Brooke Graves, *Public Administration in a Democratic Society* (Heath, 1950).
Luther Gulick, *Administrative Reflections from World War II* (University of Alabama Press, 1948).
James Hart, *An Introduction to Administrative Law With Selected Cases* (Appleton Century Crofts, 1948).
E. Pendleton Herring, *Public Administration and the Public Interest* (McGraw-Hill, 1936).
Charles S. Hyneman, *Bureaucracy in a Democracy* (Harpers, 1950).
James M. Landis, *The Administrative Process* (Oxford University Press, 1938).
Albert Lepawsky, *Administration: The Art and Science of Organization and Management* (Knopf, 1949).
Fritz Morstein Marx (ed.), *Elements of Public Administration* (Prentice Hall, 1947).
John D. Millett, *The Process and Organization of Government Planning* (Columbia University Press, 1947).
J. Roland Pennock, *Administration and the Rule of Law* (Farrar & Rinehart, 1941).
Roscoe Pound, *Administrative Law; its Growth, Procedure, and Significance* (University of Pittsburgh Press, 1942).
William A. Robson, *Justice and Administrative Law; a Study of The British Constitution* (Stevens, 2d. ed., 1947).
Joseph Rosenfarb, *Freedom and the Administrative State* (Harpers, 1948).
Herbert A. Simon, *Administrative Behavior; a Study of Decision Making Processes in Administrative Organization* (Macmillan, 1947).
Dwight Waldo, *The Administrative State* (Ronald Press, 1948).
George Warren (ed.), *The Federal Administrative Procedure Act and the Administrative Agencies* (New York University Law School, 1947).
Leonard D. White, *Introduction to the Study of Public Administration* (Macmillan, 3d. ed., 1948).
Leonard D. White et al., *New Horizons in Public Administration; a Symposium* (University of Alabama Press, 1945).

PART FOUR ★ *The Judiciary*

19

Courts and the Law

Just as the Constitution leaves undefined the legislative and executive power which it grants, so it also leaves the judicial power undefined. It tells in what courts the judicial power shall be vested and to what cases the power extends, but it does not tell what the power is. In large part the framers of the Constitution left definitions to the men who were to operate the government which it established. Those men accepted the interpretations which prevailed at the time, and particularly those which were handed down by judges as interpretations of the common law, which lay at the base of almost all Anglo-American thinking about law. For better understanding of the judicial branch of the federal government, it is necessary to deal first with the conceptions of courts and their operation which provide a framework for our thinking about law and the machinery of justice.

THE NATURE OF THE JUDICIARY

The Courts. The judiciary, that is, the system of courts, can be explained in part by contrasting it with the legislative and executive branches of the government. The primary function of the legislative branch is to make laws. Most legislatures have some added functions, and laws, as we have seen, are made to some extent by other agencies than legislatures; but the legislature is the primary agency for that purpose. The primary function of the executive branch is to carry laws into effect. It channels the dynamics of the government. It is the branch which "does things." True, it also makes law, as we saw in the preceding chapter, and it performs still other functions, but its primary function is to carry into execution the policies of the government.

The courts, by contrast, are not primarily makers of law. Neither are they primarily agencies for operating the programs which the legislature devises, even though they participate to some extent both in making law and in executing government programs. Their primary function is to settle legal disputes in terms of existing law. A court is a device for substituting peaceful settlement of disputes for settlement by force between contending parties. When one of the parties is the government itself, the final step

may still be the use of force if the government wins the case. For example, if the trial is for a capital offense, the defendant may upon conviction be put to death. If the offense is lighter, he may be imprisoned or fined. Until the trial is concluded, however, he is sheltered by a series of long-established safeguards for the protection of his rights while the court determines whether or not he committed the offense for which he stands accused, and if so, whether he should suffer the penalties which the government prosecutor urges as the lawful punishment for his crime.

A court, in other words, is a device for substituting legal rightness for force in the settlement of disputes. Two men claim title to the same tract of land. If they fight over it, the decision may rest on the fact that one man is stronger than the other, or more skilled in combat, or more courageous, or wants the property more than the other does. This kind of decision is right only in the doubtful sense that rightness is the product of force. In any event, settlement of disputes by force is likely to be expensive and exhausting. The fact that people depend on courts rather than on combat reflects both a desire for order and a belief that people have rights which are not to be measured by their ability to fight. The disputes thus settled range all the way from those which otherwise might end in fist fights or gun battles between neighbors to those which might bring war between regions or interest groups. The courts and the law are the instruments of society for preserving order and doing justice.

Judicial Safeguards. In every case a court stands between the pressures of two contending forces. It is the function of the court to resolve the conflict lawfully and to prevent its culmination in violence. The proceedings may be characterized by impassioned oratory or bitter jibe or sudden outburst or, even more impressive, by the drama of utter stillness. Justice Oliver Wendell Holmes, Jr., alluded to that stillness in a speech about the Supreme Court when he remarked, "We are very quiet there, but it is the quiet of a storm centre, as we all know." [1]

In the same speech Holmes alluded to current criticism of the Supreme Court as "merely an expression of the unrest that seems to wonder vaguely whether law and order pay." He deplored the fact that ignorant people had been taught to doubt the validity of judicial processes, for, having been taught to doubt, they know not what to believe. It seemed to him that we needed education in the obvious, that is, in the value of law and order, more than "investigation of the obscure." [2] It is not merely in modern times that people have had their doubts about courts as instruments of justice. Judges and members of the bar have long known that, since courts like other agencies of government are manned by human beings safeguards must be erected against the interests and prejudices of the men who perform the judicial task.

1. Oliver Wendell Holmes, *Collected Legal Papers* (New York: Harcourt, 1920), p. 292.
2. *Ibid.*, pp. 292–93.

These safeguards of justice have been centuries in the building and have been in slow but constant evolution. One of the better-known protective devices is the requirement that no criminal trial be held without prior indictment by a grand jury — to prevent persons from being haled into court on the mere basis of personal venom or unverified suspicion. The grand jury, that is, surveys the evidence of guilt to see whether the evidence is sufficient to justify judicial trial. If not, no trial is held. Although the grand jury requirement has been partly abandoned in some states, it is still entrenched in the federal judicial system.

Another safeguard is trial by jury, which in terms of the common law means a jury of twelve people which has power to convict only when the verdict is unanimous. Although it is often hard to secure unanimous agreement, we assume that it is better for some guilty persons to go free than for any innocent man to be convicted. Jury trial and the principle of unanimity are entrenched in the federal Constitution and therefore still prevail in the federal courts, even though the procedure has been modified or abandoned in some state courts.

Other safeguards include the requirement that the defendant shall be entitled to face his accusers in open court, to compel the attendance of witnesses in his behalf, to decide whether he will testify in his own behalf and submit to the cross-examination which accompanies the exercise of this right, to challenge biased jurors at the time of their selection, to be represented by counsel, and to have the protection of the traditional rules of evidence which have been worked out over the centuries to insure justice in trials. The judge is expected to search for justice and not to align himself with the interests of either contending party, even when one of the parties is the government which employs him. The robe he wears in court is a symbol of justice as distinguished from selfish interest or biased judgment.

The safeguards which are relevant prevail also when the case deals with civil as distinct from criminal matters, in disputes either between man and man or man and government. Although criminal litigation will remain important as long as crimes are committed, the great mass of work before the higher courts, and particularly that which attracts the highest-paid lawyers, is civil litigation. The federal Constitution guarantees the right to jury trial in civil cases in the federal courts wherever the value in controversy is more than twenty dollars. Here as in criminal matters, traditional procedures, corrected by the courts or by statute to meet modern needs, serve the cause of justice.

Judicial Justice and Legislative Justice. It is primarily courts rather than legislatures that are responsible for doing justice in individual situations. The Constitution excludes Congress and the state legislatures from adjudication to the extent of forbidding them to enact bills of attainder — legislative acts decreeing punishment without benefit of judicial trial. The United States Senate has limited judicial responsibilities in that it sits as a

court of impeachment after a federal officer has been impeached by the House of Representatives. The work of Congress which most closely approaches that of the courts, however, is that of investigating committees. Congress, like the courts, must accumulate important facts. It must be in a position to compel people to testify and to submit documents whether they want to or not.

Whereas judicial investigations are hedged about with all sorts of safeguards of the rights of witnesses, legislative investigations, as indicated in earlier chapters, sometimes grossly violate the privacy of witnesses and do unnecessary injury to the reputations of witnesses and other persons. The contrast is indicated in a comparison between the treatment of Alger Hiss in 1949 before the House Committee on Un-American Activities and before a federal district court. Before the House committee in Washington he was questioned about past connections with communists. Before the district court in New York he was on trial for perjury on a charge that he had sworn falsely with respect to past connections with communists. The committee turned its performance into an inquisition and a play for publicity. The court provided all the safeguards of the law while continuing to operate as an efficient instrument for finding facts. James Reston, of the *New York Times*, described the contrast as follows:

> In Washington there was no jury, no right of appeal to an impartial judge, no opportunity for counsel to question the accuser; there were no rigorous rules of procedure or evidence, and no reliable protection of secret testimony.
>
> In Washington the reporters and photographers had a field day. The big lights blazed on the witnesses for hours on end. The news reel and television cameras gave a touch of Hollywood and even of hippodrome to the drama. And the atmosphere was charged with the subjective clash of a pre-election campaign.
>
> Yesterday, however, the scene was different. The trial chamber, on the thirteenth floor of the Federal Court Building, was austere and even forbidding. There were no klieg lights along the somber paneled walls. There were no flash bulbs and no cameras, and though the questioning was sharp and sometimes bitter, this time it was conducted under rules that everyone understood, and in the presence of a judge and jury.[3]

There was nothing soft and sentimental about the performance in court. The court got at the facts, and ultimately, although still another trial was required, the defendant was convicted as charged. Throughout the trial, however, he was treated fairly. He was given every opportunity to present testimony on his side of the case and to answer the charges of the prosecution. There was no such slaughtering right and left of the reputations of other people as took place before the House committee and as took place in 1950 before a sub-committee of the Senate Foreign Relations Committee when an irresponsible United States senator lashed out in all directions in the hope that some person whom he struck would prove vulnerable to the charge of communism. Judicial machinery proved its worth as a painful

3. James Reston, "Hiss Trial Here Contrasts With Washington Hearing," *New York Times*, June 7, 1949.

situation was handled with a minimum of disturbance to society and of unjustifiable injury to the defendant. In this respect it proved immensely superior to the investigative machinery of congressional committees.

American vs. Totalitarian Justice. The judicial safeguards provided for Mr. Hiss are not provided by courts everywhere in the world. We have little actual knowledge of the way in which the Soviet Union and its satellite countries convert priests, government officials and government employees, and foreign businessmen caught in the toils of their police into abject persons who in court confess to crimes which we have every reason to believe they did not commit. A published statement of the pre-trial torture of a Bulgarian employee of the United States legation in Sofia gives us some clue. The torture, it seems, is so conducted as to break down the victim psychologically, whereafter accounts of experiences he has never had are so well implanted in his mind that they come out later as confessions.[4]

Josef Cardinal Mindszenty, who in 1949 was sentenced to life imprisonment by a court in Hungary, is believed to have undergone similar pre-trial treatment. A group of fourteen Washington jurists and law school deans described the trial as follows:

> The contrast between the so-called Communist justice and the justice of the civilized world, in relation to the Cardinal Mindszenty case, is also irreconcilable in the sphere of the general setting and spirit of the proceeding, the personnel of the court, and the character of the adjective [5] law followed. Any representatives of news services and diplomatic observers present were allowed only a controlled access to the facts, the defendant, and the court. Secrecy surrounding the trial lent color to the accusations that third-degree methods, or worse, were being used by the Government in preparing its case.
>
> The court, as reported in the press, was made up of five judges, but only one, the presiding judge, was an expert in the judicial process. The other four were chosen without reference to legal education or training, or professional capacity to weigh and evaluate evidence. They were professionally incompetent and politically biased. The report of the conduct of the trial showed that no standards existed for evaluating the weight and sufficiency of the evidence, or of determining its probative value.[6]

Under this system there is no recognition that the accused has any rights whatever. The system contrasts sharply with that of the United States, where the Supreme Court in 1948 set aside a verdict of murder against a Negro boy which was based on a confession extracted by questioning in private. The Court held that police questioning of the boy for several hours without the company of counsel or of any friendly person was contrary to fundamental principles of justice.[7]

In similar contrast with totalitarian practice was the trial of Valentin

4. For account of the confession and the statement concerning it by the State Department see the *New York Times*, March 5, 1950.

5. "Adjective" law is procedural law, as distinct from "substantive" law, which the courts are established to administer.

6. *Congressional Record*, March 4, 1949, vol. 95, part 12, p. A1238.

7. *Haley* v. *Ohio*, 332 U.S. 596 (1948).

A. Gubichev, a Russian, in a United States district court for conspiracy and attempted espionage against the United States while a member of the Secretariat of the United Nations. He was found guilty. As a preliminary to announcing sentence the judge summarized the privileges the defendant had enjoyed in this country, having in mind no doubt the very different treatment he would have received in his own country under similar circumstances. He spoke in part as follows:

> Valentin A. Gubichev, you have been convicted by verdict of a jury after a fair, impartial and public trial. You have had the protection of the laws of this country and you have enjoyed and had the benefit of privileges afforded to those accused of crime in few countries of the world.
>
> Before trial and until conviction you were at liberty on bail; you have had the services of counsel of your own choosing; throughout the pre-trial hearings there sat in court with you representatives of the Embassy of your country, and during the trial there sat by your side and with your counsel a representative of your country, who was learned in the law.[8]

Although Gubichev was sentenced to fifteen years imprisonment, the court suspended the sentence to permit him to depart for his own country under direction never to return to the United States, saying in conclusion,

> Your punishment will then be in the hands of the omnipotent Judge, who one day will pass judgment on us all; your treacherous actions to the cause of peace will bring down on you the maledictions of mankind.

These comparisons of different systems of justice, while intended to show the good qualities of our system, are not intended to imply that it is perfect. It is subject to criticism on many grounds.[9] Our jury system does not always work as it should. The kind of "trial by combat" which is carried on between counsel, and the preoccupation of the court with the technicalities of procedure, seem often to distract attention from the doing of essential justice. Witnesses are sometimes handled as if to prevent the discovery of facts rather than to facilitate it. Delusions of grandeur, which conceal from the judge his own prejudices, and the tradition of judicial aloofness which sometimes enables the judge to read his prejudices into judicial decisions without arousing suspicion, are matters for concern. There are still other problems, but the fact remains that our judicial system on the whole stands up well under fire.

JURISDICTION OF THE FEDERAL COURTS

Federal vs. State Jurisdiction. Each state has its own aggregation of courts which deal with all judicial matters under the jurisdiction of the state. Numerous state and local courts, variously named, have the power to try cases when they are first brought into court by one of the litigants; that is, they have what is called *original jurisdiction.* At the peak of the

8. Statement of Judge Sylvester Ryan, *New York Times,* March 10, 1950.
9. See, for example, Jerome Frank, *Courts on Trial* (Princeton: Princeton University Press, 1949).

judicial system of each state there is always a single court, variously called by some such title as supreme court or court of appeals. That court may or may not have original jurisdiction in certain matters; that is, it may or may not have the power to try cases when they are first brought into court. In any event, it does have what is called *appellate jurisdiction,* the power to examine decisions which have been handed down in courts of original jurisdiction to see if those cases were correctly decided. Between the highest court in each state and the mass of lower courts there may be others which sift out the flood of appeals which would otherwise go to the highest court. However that may be, the judiciary of each state is a kind of pyramid, with its supreme appellate tribunal at the top.

The Articles of Confederation made no provision for a federal judiciary. The judicial task in the United States was at first therefore left exclusively to the states.[10] When the Constitutional Convention laid plans for a federal government with much more extensive powers than those originally provided, it saw the necessity for providing for a judiciary as well. Said Alexander Hamilton in No. XXII of *The Federalist*:

> A circumstance which crowns the defects of the Confederation remains yet to be mentioned, — the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL. And this tribunal ought to be instituted under the same authority which forms the treaties themselves. These ingredients are both indispensable. If there is in each state a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts.

To insure establishment of that supreme tribunal which would bring harmony among the conflicting decisions of the highest state courts, the Constitution provided specifically for a Supreme Court. As for courts below this level, the framers of the Constitution were in doubt as to how far they should duplicate the state courts by establishing an independent system of federal courts. They therefore provided merely for "such inferior courts as the Congress may from time to time ordain and establish." They authorized the giving of broad jurisdiction to these courts but left to Congress the decision as to how much of that jurisdiction should actually be allocated to them. In other words, Congress was to resolve the conflict between those who, at one extreme, believed that all judicial matters in any way affecting the Union should be vested in federal courts, and those at the other extreme who thought that, apart from the work of the Supreme Court, the state courts could carry the entire load.

10. Apart from a limited right of appeal to Congress itself in the event of disputes between the states and also a provision for the hearing of appeals in connection with prize cases.

The Scope of Federal Jurisdiction. The Constitution gives to the Supreme Court original jurisdiction in "cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party." That is, cases of this kind may be tried in the Supreme Court without the necessity of originating in some lower court. The remainder of the jurisdiction of the Supreme Court, and the part which makes up most of its work, is appellate jurisdiction, that is, hearing appeals in cases already decided either in state courts or in lower federal courts. That jurisdiction is carefully restricted by Congress, primarily to permit the Court to concentrate its attention upon cases which are important not only to the litigants but also to the general public. Congress has also established and prescribed the jurisdiction of a system of lower federal courts, which will be discussed more at length in the following chapter. It is sufficient for the moment to say that the system consists primarily of a series of district courts with original jurisdiction and circuit courts of appeals with appellate jurisdiction below the level of the Supreme Court.

The Constitution outlines in the following language the jurisdiction which Congress is permitted to confer upon the system of federal courts:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more states; — between citizens of different states; — between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Except for that portion of the whole which is directly conferred on the Supreme Court as original jurisdiction, Congress may dole out jurisdiction to federal courts or withdraw jurisdiction as it sees fit. Tradition in legal matters is taken most seriously, however, and capricious action is frowned upon. The scope of jurisdiction actually exercised by the federal courts, therefore, is relatively stable and clearly defined.

Jurisdiction and Subject Matter. The jurisdiction outlined in the constitutional paragraph quoted above falls into two principal categories. The first is the jurisdiction which is based upon *legal subject matter*, the kind of law that is involved; the second is that which is determined by the *nature of the parties* involved in the suit. The subject matter classification includes those cases in which the law involved is the Constitution itself, or federal statutes, or federal treaties. If a suit turns on a legal provision in one of these fields it may be brought initially in a federal rather than a state court, whoever the parties to the suit may be; if it is started in a state court by one of the parties, the other party may have it transferred to a federal court. Even when a suit primarily involves questions of state law and is brought in a state court — if a question of federal law is also in-

volved and is properly raised in the state court — federal statutes may authorize an appeal to the Supreme Court after the highest state court has had its say in the matter.

To illustrate briefly this jurisdiction of federal courts which is based upon subject matter, a person, whoever he may be, will be brought to trial in a federal court if he is caught violating a statute prohibiting use of the United States mails to defraud. If a corporation is accused of violating the federal anti-trust laws, or if the Department of Justice seeks from a court an injunction to forbid future violations, the tribunal used will be a federal court. If a person or a corporation goes through bankruptcy pursuant to federal statutes, federal courts will handle such litigation as may be involved. If a person drafted into military service claims that either his constitutional or his statutory rights are violated, a federal court will have jurisdiction of any suit that is brought.

State and federal jurisdictions often seem to overlap. If a federal officer in pursuit of his duties in one of the states kills a man, he may be taken into custody by state officials for the purpose of bringing him to trial in a state court. The federal government, however, may remove him from the jurisdiction of state officers and have the case handled in a federal court. If it can be proved that the officer was acting in pursuit of a federal duty he will go free, whatever the state law in the matter. The situation is similar in all cases of conflict between state constitutions and laws on the one hand and the federal Constitution, statutes, and treaties on the other. If a state, in conformity with its own laws, brings a Negro to trial in a court in which Negroes are excluded from juries, such an exclusion will be held by the Supreme Court to violate the equal protection clause of the Fourteenth Amendment and to vitiate a verdict of conviction. If a person accused of a capital crime in a state court is not provided with counsel, the Supreme Court will find on appeal that a conviction is vitiated as a denial of due process of law.

Jurisdiction Based on Parties. The other category of jurisdiction is based on the kind of parties to the suit rather than on legal subject matter. A suit between two states is brought in a federal court even if the legal point involved turns on a state constitution, a state statute, or state common law. The theory is that the dignity of one state would not allow it to submit to the jurisdiction of the courts of another, and that local prejudice might well prevent its getting justice there in any event. Jurisdiction must therefore be lodged in a federal court; since states would likewise be unwilling to submit to lower federal courts, jurisdiction is lodged in the highest court in the land, the Supreme Court.

Far more important from the point of view of the bulk of litigation is the fact that suits between citizens of different states may be brought in federal district courts rather than in state courts if amounts in excess of $3,000 are involved, even though the cases turn on points of state law. It was assumed by the framers, for example, that New Yorkers who went

into New Jersey courts to secure their rights under New Jersey law might not get justice from New Jersey judges and juries. For this reason Congress gave the lower federal courts jurisdiction in all suits between citizens of different states which involved considerable amounts.

For this purpose, it should be noted, corporations are treated as if they were citizens of the states which have granted them their charters, even though their principal places of business may be in other states. So it is that a corporation operating in Ohio and involved in litigation with a citizen of Ohio may be able to institute the suit or transfer it to a federal court, if the corporation derives its existence from a charter granted by Delaware, Indiana, or some other state. Although much of the early provincialism of the several states has now disappeared, corporations usually feel that they can avoid not so much local prejudice as prejudice against corporations generally by resorting to federal rather than to state courts.

JUDICIAL LAWMAKING

The Clash of Theories. The primary function of a court is to decide cases according to existing law. In large part the court must render its decisions in terms of the relevant law as that law is at the time, even though it may regard the law as obsolete or as unjust for some other reason. Yet to some extent judges do, and must, make law as well as decide cases according to law which is already made. Our traditional judicial method is that of the common law, even when deciding cases based on constitution or statute or code. The common law judge reaches his decision in a new case by checking past decisions to see how earlier similar cases were decided. The earlier cases become precedents for the decision he hands down. No two cases are ever exactly alike, however, and it frequently happens that a judge must range a long way in search for a precedent and must finally base his decision on cases in many respects highly dissimilar to that before him. To the extent to which he must stretch the law from the precedent case or cases to the new case, he himself makes law. When he has decided his case, his decision in turn becomes a precedent for decisions in still other cases which may arise in the future. So it is that the law develops, so it is that the judge makes law.

The situation is quite similar where the Constitution and statutes are involved. Although the Constitution and statutes provide the legal basis for decisions, the Constitution is a general document which requires a great deal of interpretation to discover its meaning, and most statutes, however carefully they may be drafted, leave questions of application which the courts must decide. The Constitution, for example, gives Congress the power to regulate commerce among the several states, but it does not provide a legal definition of commerce. It does not tell what is meant by the power to regulate. It does not tell what commerce should be classified as "among the several states." What happens is that Congress, giving its own interpretation to the words of the Constitution, enacts a statute which

does something it calls regulation, about something which it calls commerce and which has some relation to two or more states. If a person injured by the statute thinks that Congress exceeded its constitutional powers in enacting it, he may by appropriate proceedings challenge the statute in a federal court. In deciding the case the court must interpret the constitutional provision to the extent of deciding whether it authorizes the challenged statute.

If there are no earlier decisions on the subject, the court may have to reason exclusively from the language of the Constitution. If there are earlier decisions, either upholding or finding unconstitutional some other statute based on the same constitutional provision, the court may rely heavily upon what has been said in those cases. If for example it has been decided in an earlier case that Congress has the power to regulate water transportation between two states, that case is likely to be used as precedent for a decision that Congress may regulate interstate transportation by railroad. A railroad case may in turn stand as a precedent for interstate transportation by aircraft.

Judge-Made Law. As long as the Constitution or the statutes, or earlier court decisions based upon them, largely determine the decision in the new case, the judge has only the responsibility of shaping the new decision accordingly. If neither law nor past decision provides adequate guidance, however, he has a broader responsibility. Perhaps the case involves a new statute which provides for more extensive regulation of commerce than any that has ever been passed upon by a federal court. Perhaps the judge has precedents in which some statutes have been upheld and others have been held unconstitutional, or in which different courts have spoken differently. As far as the legal words are concerned he could either uphold or strike down the new statute with equal logic. What shall he do?

At this point the judge plays his part as a man, as distinct from his part as a mouthpiece of the law. The law fails to dictate the decision, yet the case must be decided. Shall he uphold this statute which extends the exercise of the commerce power? There being no strictly legal answer, does he believe that the commerce power ought to be extended as in this statute? Does he believe in expanded federal regulation of enterprise? Does he believe in an approach toward federal planning of the economy? Or, does he believe that the welfare of society depends on the preservation of private enterprise, and does he classify enterprise by giant business corporations as private enterprise? In the absence of much-to-be-desired guidance from some legal mandate, such questions are likely to play a prominent part in the decision which the judge must make. The decision is formulated out of what he believes about economics and government and related subjects. What he believes on these subjects is the product of all the relevant influences which have played upon him during the course of his lifetime. So it is that he makes law, makes it in terms of what he has come to be. In the language of Judge Jerome Frank,

> Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, "bias" and "partiality" be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are pre-judices. Without acquired "slants," pre-conceptions, life could not go on. Every habit constitutes a pre-judgment; were those pre-judgments which we call habits absent in any person, were he obliged to treat every event as an unprecedented crisis presenting a wholly new problem he would go mad. Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference. . . . An "open mind," in the sense of a mind incapable of learning anything, would be that of an utterly emotionless human being, corresponding roughly to the psychiatrist's descriptions of the feeble-minded.[11]

Judicial Trends. In the over-all, it is true, trends in judge-made law are governed not by the peculiar nature of the training of individual judges but by the extent to which most of the influential judges, and particularly the judges of the Supreme Court, share a common pattern of training. Judges differ enormously, yet they also have a great deal in common. All of them, of course, are lawyers. As such they know the tremendous power of the past over the present, and in large part they tend to assume the goodness of that part of the past which comes down to us in the form of law. Most of them are successful men and tend to associate with successful people. They tend to believe in the goodness of the order which has made success possible for themselves and their friends. They are not, therefore, likely to be advocates of abrupt and drastic social and economic change. Without defining conservatism, it can be said that in general the judiciary is the most conservative branch of government.

Conservatives as a class do not stand still, however much they may seem to do so as individuals. There is a vast difference between the conservative of today and his counterpart of a generation ago, and between the latter and the conservative of still earlier generations. So it is that judges and judicial interpretations change, following the changing pattern of the civilization of which they are a part. There is what is known as a legal lag between adjustments in civilization as a whole and adjustments in the legal pattern, but the latter tend to take their shape from the former. To quote again from Judge Frank,

> Every human society has a multitude of established attitudes, unquestioned postulates. Cosmically, they may seem parochial prejudices, but many of them represent the community's most cherished values and ideals. Such social pre-conceptions, the "value judgments" which members of any given society take for granted and use as the unspoken axioms of thinking, find their way into that society's legal system, become what has been termed

11. *In Re* J. P. Linahan, 138 F. (2d) 650, 651–52 (1943).

> "the valuation system of the law." The judge in our society owes a duty to act in accordance with those basic predilections inhering in our legal system (although, of course, he has the right, at times, to urge that some of them be modified or abandoned). The standard of dispassionateness obviously does not require the judge to rid himself of the unconscious influence of such social attitudes.[12]

In the broad sweep of events since 1789, trends in the United States have been away from *laissez faire* and toward government regulation of enterprise; away from state rights and toward nationalism; away from individual liberty and toward regimentation. Because of the slowness with which they move, therefore, the courts have seemed to stand as the defenders of private property, of localism, and of individual liberty. In general, in spite of the wrath periodically expressed at judicial defeat of legislative measures or administrative action, the people have welcomed the restraining hand of the judiciary. It has given them protection against arbitrary government and the sense of security which comes with linkage to the past. If some projects have been defeated, others have been approved and reasoned into the constitutional system and have thereby acquired the label of fundamental rightness. Although the courts profess not to concern themselves with the wisdom of a measure when they pass upon its constitutionality, their action on constitutionality creates the impression that the statutes which are disapproved are bad, whereas those which are upheld are wise enactments. As long as the judiciary disapproves only occasionally and in connection with measures which are regarded as somewhat extreme, and approves most other measures and works them into the constitutional pattern, it performs a stabilizing function. It shows the people where new enactments stand with respect to the basic constitutional pattern. It gives them a sense of at-homeness with new ways of doing things and a sense of assurance that fundamental social values are not being discarded.

The difficulty comes when the courts get in the way of individual measures or a whole program of measures which are widely deemed essential to the public welfare. In defeating such a measure or such a program, the courts may destroy much of the prestige upon which most of their power depends. In the Dred Scott case,[13] decided in 1857, the Supreme Court incurred the wrath of anti-slavery people by holding that Congress had no power to exclude slavery from territories which were being settled and which would be admitted to the Union as states at some early date. The Constitution did not deal directly with the subject and it was possible to decide the case either way without gross distortion — or, more important in this instance, it would have been possible to decide this case without passing on this constitutional question at all. The Court did decide it, however, favorably to the South and contrary to the wishes and ardent prejudices of thousands of people in the North. The decision brought the most intense criticism that has ever been directed at the Court and lowered its prestige for many years to come.

12. *Ibid.*, p. 652.

13. *Dred Scott* v. *Sandford,* 19 Howard 393 (1857).

Again, the income tax decision of 1895,[14] which prevented the collection of a graduated tax on incomes until a constitutional amendment was adopted in 1913, resulted in criticism of the Court which continued long after the judicially erected barrier had been removed. The Court, dominated by justices who regarded a graduated income tax as a dangerous attack upon the capitalist system, resorted to a strained interpretation of the Constitution to hold the taxing measure unconstitutional. It did so in an era in which government was expanding its activities and the cost of the federal government was reaching a substantial figure. Large numbers of the people were coming to believe that wealth was not adequately paying its way. The Supreme Court, therefore, came to appear as an instrument for relieving wealthy people from the necessity of paying their legitimate debts to society.

Two other examples were provided by cases decided in 1918 and 1923. In one the Supreme Court held that Congress had no power to restrict child labor by prohibiting shipment in interstate commerce of goods produced by child labor.[15] In the other it held that to fix minimum wages that could be paid to women was an unconstitutional denial of due process of law.[16] While both decisions were in complete harmony with the thinking of large numbers of people, advocates of social justice were in increasing numbers demanding that government perform the functions which the Court here held could not be performed. The latter group increased in numbers and influence until, in the middle of the New Deal period, a Supreme Court with new membership overruled the unpopular decisions.

The New Deal Period. The New Deal period was unique in American constitutional history. The Supreme Court had often stirred antagonism by holding statutes unconstitutional, but such decisions had usually been spaced at some distance, and the statutes affected had never provided integrated units in a complicated pattern of governmental action. Many of the New Deal statutes, however, did fit together into such a pattern. A whole series of Supreme Court decisions, furthermore, concentrated in a period of approximately two years between 1935 and 1937, tore at the New Deal program by holding successive statutes unconstitutional. The members of the Court, or a majority of them, true to the traditional pattern of their thinking, believed that the New Deal measures represented bad economics and bad government. The New Dealers were convinced that the economic and political thinking of the judges and their companions in society was obsolete and should no longer be permitted to determine whether a statute was constitutional or unconstitutional.

To protect the New Deal program against judicial attack, President Roosevelt's aides devised a thinly veiled plan to pack the Supreme Court through the appointment of a number of new members who, of course, would be carefully selected in the light of their attitude toward the pro-

14. *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895).
15. *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918).
16. *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923).

gram. Although the rank and file of the American people make no pretense of knowing just what the Supreme Court is, it is to many of them a hallowed institution. While the packing movement received support from New Deal advocates, it also offended many people. In effect the Court itself beat off the attack upon it by the device of shifting the trend of its decisions. The language used in rationalizing new decisions continued as before to be the language of the law. It had at once the plausibility and the lack of drama which characterize smooth legal reasoning. The fact remained, however, that the Court shifted its position just enough to enable a majority of its members to find important New Deal statutes constitutional rather than unconstitutional. The shift did not mark a basic change in the Constitution, but it did mark an important change in the factors which governed decisions on the periphery of the Constitution where the words of the Constitution itself provided no adequate guidance.

With the changes in Supreme Court personnel which followed the critical period in 1937, the philosophy of the Court came more into harmony with the program of the federal government. In the succeeding ten years it did strike down provisions in two statutes, but one of them was a very minor provision [17] and the other marked a gross congressional departure from good conduct in attempting to drive out of the federal service by depriving them of their salaries certain employees against whom no misconduct had been proved.[18] Although the Court continued to pass upon the constitutionality of statutes, its decisions were such as to indicate that federal statutes which fitted into the general pattern of the New Deal, and then the pattern of World War II, would be pretty much assumed to be constitutional. Apart from testing the constitutionality of state statutes, therefore, the major task of the Court for the period in question came to be that of interpreting the large number of very general statutes which Congress had enacted for the regulation of various aspects of the social and economic order.

Judicial Interpretation of Statutes. The judicial task in interpreting modern general statutes enacted by Congress is much the same as the task of interpreting the Constitution. Specific statutes, such as those requiring construction of a bridge or the operation of an airline, may require little judicial interpretation. The situation is different, however, when the statute forbids combinations in restraint of trade, as does the Sherman Anti-Trust Act; or outlaws unfair trade practices, as does the Federal Trade Commission Act; or outlaws unfair labor practices, as does the Taft-Hartley Act. Even if the statute itself partly defines such terms, years of litigation may take place before counsel can confidently advise clients as to what they mean. The court of course examines all the relevant language of the statute, but such an examination may not yield a satisfactory answer to the exact question in the case at hand. More and more in recent years the Supreme

17. *Tot* v. *United States,* 319 U.S. 462 (1943).
18. *United States* v. *Lovett,* 328 U.S. 303 (1946).

Court has been persuaded to utilize what are called extrinsic aids, such as congressional hearings, reports, and debates to discover the intent of Congress in enacting the measure. If such aids are inconclusive, then judges tend to resort to the same kind of social considerations as those which guide their interpretations of the Constitution when inadequate guidance is provided by the Constitution and the precedents.[19]

THE IMPACT OF JUDICIAL REVIEW

The Constitutional Base. There is no statement in the Constitution which says directly that any federal court shall have the power to nullify an act of Congress by holding it to be in conflict with the Constitution. In writing No. LXXVIII of *The Federalist*, however, Alexander Hamilton revealed the assumption that the power was there. It seemed to him necessarily implicit in the arrangement of the three branches of the federal government as well as of state governments. The Constitution was itself law and it provided the legal base for all statute law that might be enacted. A statute which was not authorized by the Constitution could not be law, and could not be enforced by the courts.

The Supreme Court first exercised its power of striking down acts of Congress in the case of Marbury *v.* Madison,[20] which was decided in 1803. In deciding the case Chief Justice John Marshall pointed out, among other things, that the Constitution which prescribed the pattern of government was itself a law, the supreme law of the land, and therefore must be paramount to any statute in conflict with it. Judges who were sworn to uphold the Constitution must, in the event of conflict, adhere to that instrument rather than to an act of Congress.

Although the precedent for striking down an act of Congress was clearly established in 1803, the power was not used again until in the Dred Scott case in 1857.[21] During the intervening period, federal statutes were appraised in terms of the Constitution, but none was found by a majority of the Supreme Court to be in conflict with it. After the Civil War there was a considerable increase in the amount of federal legislation enacted, and with it came an increase in the restrictive activities of the Supreme Court. Between 1865 and 1900 it handed down some twenty-four decisions in which acts or parts of acts of Congress were held unconstitutional. From 1900 through 1934, a period of still greater increase in the amount of legislation, there were some forty such decisions. During 1935 and 1936, eleven such decisions established barriers to much of the New Deal program.

19. For discussion of techniques of statutory interpretation see Felix Frankfurter "Some Reflections on the Reading of Statutes," *Columbia Law Review,* vol. 47 (May, 1947), pp. 527–46; Robert H. Jackson, "The Meaning of Statutes: What Congress Says or What the Courts Say," *American Bar Association Journal,* vol. 34 (July, 1948), pp. 535–38; and Jerome Frank, "Words and Music: Some Remarks on Statutory Interpretation," *Columbia Law Review,* vol. 47 (December, 1947), pp. 1259–78. See also Jerome Frank, *Courts on Trial* (Princeton: Princeton University Press, 1949), Chapter XXI.

20. *Marbury* v. *Madison,* 1 Cranch 137 (1803).

21. *Dred Scott* v. *Sandford,* 19 Howard 393 (1857).

After the 1937 attempt to pack the Court in order to secure a reversal of the trend of decisions came a decade in which only two statutes were stricken.

The influence of the judiciary is not to be measured, it is true, merely by the number of statutes held unconstitutional. It exerts an influence on legislation merely by holding the power to strike it down, whether it exercises that power or not. Congress legislates somewhat according to its beliefs about what the courts will uphold. As already indicated, furthermore, the influence of the judiciary is exercised not merely by striking down legislative acts but also, and in considerable measure, by interpreting them broadly or narrowly. With statutes as with the Constitution, the social and economic predilections of the justices affect interpretation, not when the law is clear but when the legal provisions are such as to make it equally feasible to decide one way or another. Such situations arise far more often than one might expect. The legislature can seldom sense all the eventualities to which a statute may be applied and draft its provisions accordingly. There is no way of avoiding the necessity of interpretation by somebody.

The Federal Judiciary and the States. The restrictive power of the federal judiciary is exercised upon the states as well as upon the legislative and executive branches of the federal government. To establish the unquestioned supremacy of federal law over state law, the framers of the Constitution included in Article VI the following paragraph:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or law of any state to the contrary notwithstanding.

Congress has given the right of appeal to the Supreme Court from state court and lower federal court decisions which have been based on state constitutions or laws when there is ground for believing that the constitutions or laws are in conflict with the federal Constitution or with valid federal statutes or treaties. In cases of conflict the state measures must fall.

The courts restrict state power by way of some of the clauses which give power to Congress. That is, the grant of power to Congress may stand as an implied if not an express bar to the exercise of state power in the same field. For example, the commerce power, which is one of the major sources of congressional authority, by implication limits the authority of the states to regulate interstate commerce. Since the prohibition is not clearly expressed there has always been doubt as to how far the states could go in regulating interstate commerce in the process of managing their own internal affairs. It has been apparent that local regulations must fall if they conflict with federal regulations. It has been clear that federal and state regulations may overlap without necessarily invalidating the latter, as when a state enforces police regulations on interstate passenger trains. In more doubtful situa-

tions, however, there has been an enormous amount of litigation. Here as elsewhere the opinions of judges have been guided not only by the Constitution and the precedents but by their own and the people's conceptions of what the line of decisions ought to be.

Other constitutional provisions express outright prohibitions against state action but still require judicial interpretation. One of the important ones forbids the making of laws impairing the obligation of contracts. When during the early years of our history the Georgia legislature tried to recapture control of land which a corrupt predecessor had sold for a fraction of its cost, the Supreme Court held that it could not do so since each action would violate the contract by which the state had originally granted the land.[22] The inviolability of corporation charters is based on this clause.[23] The courts long interpreted it in such a way as to protect broad rights of American business.

Due Process Restrictions. By provisions in the Fifth and Fourteenth Amendments the federal government and the state governments respectively are forbidden to take life, liberty, or property without *due process of law.* The Constitution does not define due process of law. No court of higher jurisdiction has ever clearly defined it. Its application in a given case is to be determined only by examining its use in earlier cases. Basically "due process" is a standard of measurement of right procedure in the courts. As illustrated earlier in this chapter, an accused person cannot be convicted by a confession extorted from him by "third degree" methods. Such a conviction violates the due process restriction. The defendant in capital cases must be provided with counsel, and counsel must have opportunity for preparation of his case. Various other restrictions are included within the meaning of the term. By way of general explanation Justice Frankfurter has said that

> Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are the less likely they are to be explicitly stated. But respect for them is the very essence of the Due Process Clause. In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large, untechnical concept as "due process," the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions.[24]

The quotation illuminates the indefiniteness of the constitutional restriction. The Justice commits the Court to the task of interpreting "the deepest notions of what is fair and just and right." In spite of his disclaimer it is hard to see how in that process it can altogether avoid translating "personal views into constitutional limitations."

Since the 1880's the due process clauses have had a broader meaning than that of restriction on procedures of justice in the courts. The procedural

22. *Fletcher* v. *Peck,* 6 Cranch 87 (1810).
23. See *Dartmouth College* v. *Woodward,* 4 Wheaton 518 (1819).
24. *Solesbee* v. *Balkcom,* 70 S. Ct. 357 (1950).

requirement is that what is done must be done in the right way. The Supreme Court expanded interpretation to prohibit the doing of some things altogether. In purely private businesses, for example, governmental regulation of prices was held to take liberty and property without due process of law, whatever the level at which the prices were fixed. In the field of public utilities and a few other businesses in which prices could be fixed because the businesses were classified as "affected with a public interest," the rates fixed had to be high enough to permit the business to earn a "fair return on the fair value" of the property involved. Otherwise the regulation took liberty and property without due process of law. By this line of interpretation the Supreme Court gave broad protection to various aspects of rights of property. Beginning in the early 1930's, however, the Court gradually receded from this interpretation, so that business now gets little protection from due process clauses except the procedural protection which constituted most of the original meaning.

Today it is only in the field of civil liberties that due process gives much more than procedural protection. The due process clause of the Fourteenth Amendment is interpreted to mean that a state may not interfere with freedom of religion, freedom of speech, freedom of the press, or freedom of assembly. These freedoms are protected against the federal government by the First Amendment, but they can be protected against the state governments only by this kind of expanded interpretation of the due process clause. The fact that the Supreme Court has expanded its interpretation of the due process clause for protection of civil liberties while it was restricting the protection given to property indicates a trend in the beliefs of the Court and probably in the beliefs of the people as well. Control of property is becoming more and more necessary for the kind of economic order we wish to maintain, but as we regulate property we become more and more concerned about the preservation of the personal freedoms which make life worth while.

Here again the Supreme Court has permitted its conceptions of the good society to guide its interpretations of the Constitution. As now constituted, it believes that, to the maximum extent possible, men ought to be free. No such generalization is to be found in the Constitution, but the justices apparently find it in the spirit of the Constitution. The point is pressed upon them by counsel in the argument of cases before the Court. The cases are before them and must be decided, in spite of the indefiniteness of constitutional language. Current judicial conceptions of the good society shape the course of decisions. Whether in this process the Court unjustifiably arrogates power to itself usually depends on the degree to which its conceptions differ from those of the people generally, unless, of course, there is an absolute distortion of constitutional language. And this is rare. Sometimes a trend of interpretation, such as that of substantive due process with respect to property, does get out of hand, and by moving through case after case imperceptibly leads the Court so far from its constitutional base that it must ultimately get "back to the Constitution" and make a fresh start.

All this, however, requires further discussion of the place of law in society, a subject to which it will be necessary to return after a chapter dealing with problems of organization and personnel of the courts which apply the law and, in applying the law, succeed also in making it.

References

Robert K. Carr, *Federal Protection of Civil Rights: Quest for a Sword* (Cornell University Press, 1947).
———, *The Supreme Court and Judicial Review* (Farrar & Rinehart, 1942).
Jerome Frank, *Courts on Trial* (University of Princeton Press, 1949).
———, *Law and the Modern Mind* (Coward-McCann, 1949).
Paul A. Freund, *On Understanding the Supreme Court* (Little, Brown, 1949).
Vladimir Gsovski, *Soviet Civil Law* (University of Michigan Law School, 2 vol., 1948–49).
Charles G. Haines, *The American Doctrine of Judicial Supremacy* (University of California Press, 2d. ed., 1932).
Oliver W. Holmes, *Collected Legal Papers* (Harcourt, Brace and Howe, 1920).
Milton R. Konvitz, *The Constitution and Civil Rights* (Columbia University Press, 1947).
C. Herman Pritchett, *The Roosevelt Court; a Study in Judicial Politics and Values, 1937–1947* (Macmillan, 1948).
Benjamin R. Twiss, *Lawyers and the Constitution* (Oxford University Press, 1942).
Andrei Y. Vyshinskii, *The Law of the Soviet State* (Macmillan, 1948).
Charles Warren, *Congress, the Constitution, and the Supreme Court* (Little, Brown, rev. ed., 1935).

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Judicial Organization and Operations

Because the nature of law and the processes of interpreting law are so complex and intangible, the student of the judicial process will find it desirable from time to time to turn from abstract materials to the more concrete subject of the organization and operation of the courts. Like other types of governmental institutions, the courts have their problems of personnel, organization, and hierarchy. Although these problems are not necessarily in themselves problems of law or right or justice, their adequate solution is prerequisite to the adequate performance of judicial functions. This chapter will describe the federal courts and outline the way they work and the way they are related one to another. Because of the superior importance of the Supreme Court, it will be dealt with first and at greatest length.

THE SUPREME COURT

The Physical Setting. At the top of the federal judicial system is the Supreme Court, which since the early 1930's has been housed in an imposing marble structure facing across the park toward the east front of the national capitol. The building was reported to have cost roughly nine million dollars, or as some commentators put it, a million dollars for each of the nine justices. The building includes not only the court room proper but also offices for the justices and the several officers of the court and space for the well equipped law library and for conferences and various other functions. The beautifully draped and carpeted court room is a relatively small chamber. It was kept so deliberately. Although rows of benches are provided for the general public, it was not desired that space be provided for an audience so large as to have an impact upon judicial proceedings. A railing toward the front of the court room marks off a substantial area for the seating of members of the bar. The well-padded revolving chairs of the justices are arranged in a row on a platform at the front of the room and behind a railing. The place for seating the justices is referred to as "the

bench." At either end of the bench is desk space for officers of the court.

The Supreme Court building is one of the show places of the capital city, and curious observers are always present in the court room when the Court is scheduled to be in session. On such days, promptly at noon, there is heard the sharp sound of a gavel, and the audience rises as the crier of the Court intones, "The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States." At the same moment nine black-robed justices filter quietly through the draperies behind the bench and walk to the seats to which they are permanently assigned. As they stand in line before taking their seats, the crier intones

> Oyez, Oyez, Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court.

The justices and the audience then sit down and the Chief Justice prepares to call the business of the hour. The Chief Justice always occupies the central position on the bench. The other justices are arranged in order of seniority. The one most recently appointed sits at the extreme left of the Chief Justice. The next in order sits at his extreme right. The others are arranged accordingly, with the eldest in point of service at the immediate right of the Chief Justice. The senior associate justice presides over the Court in the absence of the Chief Justice.

The Argument of Cases. Although it performs other minor functions, such as admitting attorneys to the bar of the Court, the primary purpose of the Supreme Court in assembling in the court room is to hear the argument of cases and at less frequent intervals to announce its decisions in those cases. The annual term of the Court ordinarily runs from the first Monday in October until sometime the following June. It usually continues in session for intervals of two weeks, whereafter it recesses for periods of similar length to write opinions and do other office work connected with the duties of the Court. During the periods of its public sittings, the Court meets at 12:00 o'clock, remains in session until 2:00 o'clock, recesses until 2:30, and then returns to remain in session until 4:30. Saturdays are reserved for conferences.

In the early years of the Supreme Court, when the pressure of business was light, it was possible to permit the argument of each case at such length as counsel desired. The growing burden of work has long since made such deliberateness impossible. In most cases only an hour is allotted for argument by each of the two contending parties. Obviously very few of the complicated cases which reach the Supreme Court can be adequately expounded from beginning to end in this limited period. The justices, therefore, must rely upon sources of information in addition to arguments by counsel. Since most of the cases argued before the Court have been heard initially in some lower federal court or in a state court, part of the necessary information is derived from the printed record of proceedings in these

tribunals. Furthermore, counsel on each side is required to file with the Supreme Court a brief covering the points and relevant materials of the case. Forty copies of the printed brief of counsel for the appellant or petitioner must be filed with the clerk of the Supreme Court at least three weeks before the case is called for hearing, and the same number of copies must be filed by counsel for the appellee or respondent one week before the hearing. The brief must contain an index of its subject matter and a table of cases, statutes, and textbooks cited therein. The brief must summarize the argument of counsel, "exhibiting clearly the points of fact and of law being presented, citing the authorities and statutes relied upon, and quoting the relevant parts of such statutes, federal and state, as are deemed to have an important bearing." [1]

Before a case is argued, it is presumed that each justice will have familiarized himself with it to the extent of reading the brief and at least scanning the record of the case as it came from the lower court. The strategy of counsel in arguing the case is to present it in such a way as to throw the best possible light on the claim of his client. The justices sometimes permit the oral presentation to be made exactly as planned by counsel. If, on the other hand, they suspect that the lawyer presenting the argument is doing so in such a way as to cover as deeply as possible the weaknesses of his position, they may by persistent questioning defeat his initial strategy. Furthermore, the justices are already broadly familiar with most legal questions presented to the Court and seldom require the elaborate discussion of those questions which counsel plans to present. From the record, the briefs, and a very limited amount of oral argument, they can as a rule grasp most features of the case. Their questioning, therefore, is often concentrated on some narrow point or points which counsel perhaps deems largely irrelevant, with the result that his time is exhausted in what he regards as futile discussion and he is required to take his seat with the feeling that he has not been permitted adequately to present his case. As if wearied by the necessity of sitting passively hour after hour listening to the arguments of counsel, the justices sometimes seem deliberately to engage in a foray of revenge by hurling at counsel every embarrassing legal question they can think of. The lawyer who attempts to resort to oratory before the Court inevitably undergoes deflation by questions which puncture his rounded sentences and break up the order of his presentation. In the days when John Marshall was Chief Justice, the Court had time for orations by Daniel Webster, William Pinkney, and other spellbinders of the day, but the present Court is concerned with the skillful presentation of legal arguments rather than with the fine art of emotional appeal. It prefers to maintain what Justice Holmes called "the quiet of the storm center."

The Decision of Cases. At noon each Saturday the justices meet in conference, arranged around a conference table by seniority, with the Chief

1. *Revised Rules of the Supreme Court of the United States,* Rule 27, par. f.

Justice presiding. Here they discuss in private the cases which have been publicly argued. The procedure of discussion changes but little from decade to decade. As described by Justice Harlan F. Stone in 1928, it was as follows:

> At Conference each case is presented for discussion by the Chief Justice, usually by a brief statement of the facts, the questions of law involved and with such suggestions for their disposition as he may think appropriate. No cases have been assigned to any particular judge in advance of the Conference. Each Justice is prepared to discuss the case at length and to give his views as to the proper solution of the questions presented. In Mr. Justice Holmes' pungent phrase, each must be ready to "recite" on the case. Each Judge is requested by the Chief Justice, in the order of seniority, to give his views and the conclusions which he has reached. The discussion is of the freest character and at its end, after full opportunity has been given for each member of the Court to be heard and for the asking and answering of questions, the vote is taken and recorded in the reverse order of the discussion, the youngest, in point of service voting first.
>
> On the same evening, after the conclusion of the Conference, each member of the Court receives at his home a memorandum from the Chief Justice advising him of the assignment of cases for opinions. Opinions are written for the most part in recess, and as they are written they are printed and circulated among the justices, who make suggestions for their correction and revision. At the next succeeding Conference these suggestions are brought before the full Conference and accepted or rejected as the case may be. On the following Monday the opinion is announced by the writer as the opinion of the Court.[2]

Although most cases are decided relatively promptly, some of the more difficult ones may require several weeks or even several months to reach a decision and to work out court opinions acceptable to the maximum number of justices. In such cases, concurring and dissenting opinions are likely to be presented along with the opinions of the court. A concurring opinion is one which reaches the same conclusion as the opinion of the Court on the final disposition of the case, but reaches it through a different line of legal reasoning. The concurring opinion is written not to protest against the decision, but to disclaim responsibility for things said in the opinion of the Court or to present a different line of reasoning. Dissenting opinions are written by justices who not only reject the line of reasoning of the majority of the Court but who wish also to arrive at a different final conclusion. Concurring and dissenting opinions are important not for any effect they have on the disposition of the case at hand, but for the influence they may have on legal thinking and on the shaping of other decisions in future cases. A line of minority reasoning presented persistently year after year may conceivably have such an impact upon legal and social thinking as to become eventually the majority position of the Supreme Court when enough changes in personnel have taken place. The long line of concurring and dissenting opinions written during the 1920's and the early 1930's, usually in the names of Justices Holmes, Brandeis, and Stone, became in the

2. Harlan F. Stone, "Fifty Years Work of the United States Supreme Court," *American Bar Association Journal*, vol. XIV (August–September, 1928), p. 436.

1940's much more nearly representative of the dominant trend of judicial thinking than were the majority decisions of the same period.

Decisions of the Supreme Court are usually presented at the Monday sessions. At those sessions, at the call of the Chief Justice, the opinions of the justices are presented in the order of seniority, beginning with the junior member. It was once the custom to read opinions in full. The pressure for time and perhaps also the desire to make the most effective presentation possible has led in recent years to shortening the amount read and often to the substitution of extempore statements of the contents of opinions. The opinions in full are made immediately available in printed text for persons concerned with exact language. Concurring and dissenting opinions are presented in each case immediately after presentation of the majority opinion. If feeling among the justices has run high over their differences in particular cases, that feeling may and often does reflect itself in the vigor of court room delivery. The "nine old men," for all their age, are never so old as to lack intense conviction and prejudice.

Publication of Opinions. Supreme Court opinions, including concurring and dissenting opinions as well as those of the Court, are published in three separate editions. Cases are cited in each edition by volume and page. The edition published by the federal government is entitled *United States Reports.* In that edition the opinions handed down during each annual term are incorporated into approximately three volumes. Here a case decided in 1936 in which the Agricultural Adjustment Act was declared unconstitutional is cited as United States *v.* Butler, 297 U.S. 1. Another edition, commonly known as the Lawyers' Edition, is published by the Lawyers Cooperative Publishing Company and is labelled *United States Supreme Court Reports.* This edition binds in a single volume all the opinions handed down in a single year. In this edition, the case of United States *v.* Butler, mentioned above, is cited as 80 L. Ed. 477. The third edition, the *Supreme Court Reporter,* published by the West Publishing Company, also binds in a single volume all the opinions handed down in a single year. In this edition United States *v.* Butler is cited as 56 S. Ct. 312. Each of the three editions is extensively used, and in the writing of new opinions each is usually referred to in the citation of earlier cases. The complete citation of United States *v.* Butler, for example, is 297 U.S. 1, 80 L. Ed. 477, 56 S. Ct. 312. The three editions are supposed to carry identical texts of the opinions, but they differ in the amount of material added from lawyers' briefs and in the phrasing of the headnotes which each edition includes to summarize the legal contents of each case. The purpose of the headnotes, which are labelled by number and title, is to extract from the opinions the statements which have legal significance. The publishers of the two private editions extract these headnotes from several cases and recombine them in digests so as to bring together the several headnotes bearing on related subjects. By recompiling this digested material they provide lawyers and judges with guides to official statements of law on

subjects in which they are interested. Without such guides, the task of the lawyer in the face of the tremendous accumulation of judicial decisions already available would be virtually hopeless. Through these and other tools of legal methodology, it becomes possible for an individual with only moderate training and ability to find his way around in the subject matter of law. For persons who must have access to opinions before publication of the official volumes, the government publishes each opinion in pamphlet form, and the private publishers bring out each year a number of paper bound volumes, including opinions handed down over periods of two or three weeks. These pamphlet volumes are usually known as advance sheets. The opinions are also published within a day or two of delivery in a weekly magazine entitled *United States Law Week.*

Supreme Court Personnel. The Constitution provides that Supreme Court justices shall be appointed by the President by and with the advice and consent of the Senate and that "the judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." From the time when President Washington submitted to the Senate his first slate of Supreme Court appointments, the attempt has been made almost invariably to select men of high prestige and outstanding ability. Appointments have been made from time to time, it is true, to pay political debts, to show deference to a particular section of the country, or even to provide representation for a political party which would not otherwise be represented. A critic of one of President Franklin D. Roosevelt's appointees was heard to remark that the President had made the appointment to show his contempt for the Supreme Court. Even so, the caliber of the men selected has in general been high.

The men appointed to the Court are usually well advanced in age at the time of their appointment. The youngest was Joseph Story, who was appointed in 1811 at the age of 32. Successful candidates have almost always reached well into their forties, are often in their fifties, and are occasionally in their sixties at the time of their selection. Because the work of the Court, although strenuous, seems not to impair longevity, the average age of the justices is frequently high, and justifies the characterization of the Court as "the nine old men." In the spring of 1937, for example, when President Roosevelt made his attempt to pack the Supreme Court with younger men of fresher outlook, the average age of the justices was between 72 and 73 years. The subsequent retirement of most of the justices then sitting permitted President Roosevelt to reduce the average age to a point in the middle fifties, whereafter it began once more its steady rise. In 1950, after four replacements had been made by President Truman, the average age was just under 61 years.

Since justices do not readily give up office even with the approach of senility, the membership of the Court has often included men past the age

when they could carry their share of the work. In the early 1830's Justice Duvall became too deaf to hear arguments or discussion on the bench. During the Civil War Chief Justice Taney was ill so much of the time that most of the work of the Court had to be done without him. Shortly after the Civil War, Justice Grier became so feeble mentally that his colleagues had to suggest his retirement. Justice Field in 1897 had reached the same stage. William H. Taft as President from 1909 to 1913 saw the need for replacement of a number of superannuated members of the Supreme Court and as Chief Justice during the early 1920's faced the same problem, but could do nothing until deaths and resignations made new openings on the bench.

Tenure. One reason for the reluctance of aged justices to resign from the Court is that, like people in many other vocations, they have lived so long in one vocational groove that they have become unable to conceive of a tolerable life without their habitual functions. Another reason, until recently, was that no adequate pension system was provided. This situation was corrected in 1937, when Congress made it possible for justices under certain circumstances to retire at seventy years of age without actually resigning and without giving up the compensation to which they were entitled as members of the Court. In spite of this arrangement, by no means all justices who reached the retirement age were willing to exercise the privilege.

There has been much criticism of life appointments for justices. It is argued that when justices are appointed without possibility of removal except for impeachable offenses — and no member of the Supreme Court has ever been so removed — they lack the needed incentive to keep up with the times and to exercise their functions in harmony with the dominant sentiments of the people. It is contended that, as in the early 1930's, a Supreme Court whose thinking is completely behind the times can be dangerously destructive when the survival of the nation depends upon making changes which are inconsistent with the obsolete ideas and prejudices of the Court. It is contended, on the other hand, that it is the function of the Court to give heed only to the law, and to do adequate justice it must be protected against political influences which would press upon it if its members had to seek re-appointment or election from time to time. The defenders of life appointments contend that without security of tenure the Court would lack the serenity of outlook which is necessary to sound performance at the storm center of group conflicts. The critics reply that serenity is no asset if it fails to bring sound judgment in terms of all the factors which should be taken into consideration. Even members of the Court themselves have been heard to remark that a tribunal made up of life appointees is undemocratic and a cause for concern.

It is not the purpose of this book to take sides in this controversy. Certain it is that the arrogance of power reveals itself on the bench as well as in other governmental positions. On the other hand, self-governing people

find it necessary in various ways to set up checks against their own too hasty action through legislative and executive instruments. Much of the purpose of law and government is to restrain and channel the conduct of the people — even though the people themselves be the governors — in the interest of the welfare of all. We do not altogether abandon law and government because lawmakers and governors may make mistakes and misuse their powers. The amount of immunity from interference which we give our various officers depends upon the amount deemed necessary for adequate performance of their functions. The proper performance of the judicial function has long been assumed to require more complete freedom from interference than is required by officers in other governmental stations. Although unsound judgment has at various times lowered the prestige of the Supreme Court, that prestige has generally been maintained at such a level as to indicate a popular belief that for all its mistakes the Court has justified the confidence bestowed upon it in giving life tenure to its members.

Qualifications of Judges. There is controversy also over the qualifications of judicial appointees. Integrity, soundness of judgment, and knowledge of law are, of course, to be included. Opinion differs on how well outstanding success in the practice of law indicates the ability to perform well as a judge. Men who were able advocates in court have been heard to remark that they had served in that capacity too long to develop the kind of balanced judgment which ought to be exercised from the bench. There is even disagreement over the extent to which previous judicial experience in other courts is helpful to a member of the Supreme Court. Such experience may provide great knowledge of technical problems of law, but it does not necessarily develop the kind of perspective that is needed by a Supreme Court justice who must operate on the frontiers of the Constitution. Certain it is that experience in high governmental office has done as much to prepare men for service on the Supreme Court as has been done either by practice at the bar or service on an inferior bench. During the administration of President Franklin D. Roosevelt, there was some tendency to look to teaching of law in some of the country's better schools as equipment for the work of a judge. The assumption was that able men were more likely to do creative thinking about necessary adjustments in the law in the environment of a law school than in the forum of active practice.

INFERIOR FEDERAL COURTS

United States District Courts. The Supreme Court stands at the peak of the federal judicial hierarchy. Next below it are the circuit courts of appeals in the ten circuits. Below these appellate courts are the United States district courts which are the federal courts of original jurisdiction. A court of original jurisdiction, as previously explained, is a court in which a case is originally brought to trial. It is there that the facts and the law

are first brought together to shape a decision in the case. Appellate tribunals merely inquire into alleged errors in the work of courts of original jurisdiction. The United States is divided into nearly one hundred judicial districts, each with at least one district judge, though districts in the more populous areas have varying larger numbers. The southern district for New York, for example, which includes New York City, has a total of eleven district judges. A few of the more thinly populated states are covered by single districts. Other states may have as many as three districts. The number of judges in each state is governed largely by the amount of business to be done rather than by the number of districts into which the state is divided. The total number of district judges in the United States is approximately two hundred.

Selection of District Judges. Much that has been said about Supreme Court personnel is true also of the personnel of the district courts. They are appointed for life, or, at any rate, for good behavior, with the privilege under certain circumstances of retiring on full pay at seventy years of age. There have been occasional removals for misbehavior either by impeachment or by demands backed by the threat of impeachment, but such actions have been rare. Appointments to district judgeships, being on a somewhat lower level than appointments to the Supreme Court and to the circuit courts of appeals, tend somewhat more often to be made as rewards for political services. Generalizations on this point are hard to make, however, because situations differ with Presidents submitting nominations, with the personnel of the Department of Justice which investigates the character of appointments, with the composition of the Senate which must act on all such nominations, and even with the attitude of the Supreme Court and the character of the Chief Justice who at times exercises considerable leadership in attempts to secure the appointment of high quality men to the courts of original jurisdiction. The Supreme Court is concerned in the matter because the number of district court decisions from which appeals are taken is governed somewhat by the caliber of the district judges and the extent of public confidence in them. The low or high quality of the decisions of the district courts, furthermore, provides in part a measure of the task which the Supreme Court will have to perform in cases which are appealed.

When the Senate acts on a Supreme Court nomination, it is seldom that a nominee is rejected primarily because of opposition of the senators of the state from which the nominee happens to come. District judgeships, however, tend to be regarded much more as the political spoils of the senators from the respective districts. In order to secure confirmation of his nominees, the President must ordinarily have the support of at least one of the senators from the state in which the district is located if those senators are members of the President's own party. It is not to be inferred that either the President or the Senate operates on the lowest political level when district judgeships are to be filled. Most Presidents and large

numbers of senators see the need for maintaining relatively high standards in the selection of judges. Yet among candidates of reasonable competence and occasionally among those whose competence is by no means all it ought to be, partisan considerations may play an excessive part in determining final selection. If it could be assumed that election by the people or some other form of appointment would eliminate or reduce emphasis on these considerations, a change in the method of selection would be desirable. Unfortunately, there is little evidence that mere changes in mechanism would produce the desired results.

District Courts in Operation. Unlike the Supreme Court, a district court usually operates under the supervision of a single judge. Like the Supreme Court justice, he ordinarily wears the black robe of his office. His entrance into the court room is marked with only less formality than that which characterizes Supreme Court procedure. As with Supreme Court justices, the phraseology by which he is addressed includes such terms as "Your Honor," "If your Honor please," or "If the court please." All the symbolism of dress and address and behavior generally in the court room tends to emphasize the assumption that the judge is a man set apart, uninfluenced by the special interests of litigants or matters of popular fashion or any other considerations which might interfere with the doing of justice.

The attorney, by contrast, is paid to see his case in the light of the interests of his client. It is his function to translate the interests of his client into effective legal statements and to persuade the court to accept his interpretation of the law. His opponent, the attorney for the other side, attempts to do the same thing from the point of view of his own client. In a sense, therefore, the trial judge acts as a referee in a trial by verbal combat between legally trained proxies employed by litigants who have opposing interests.

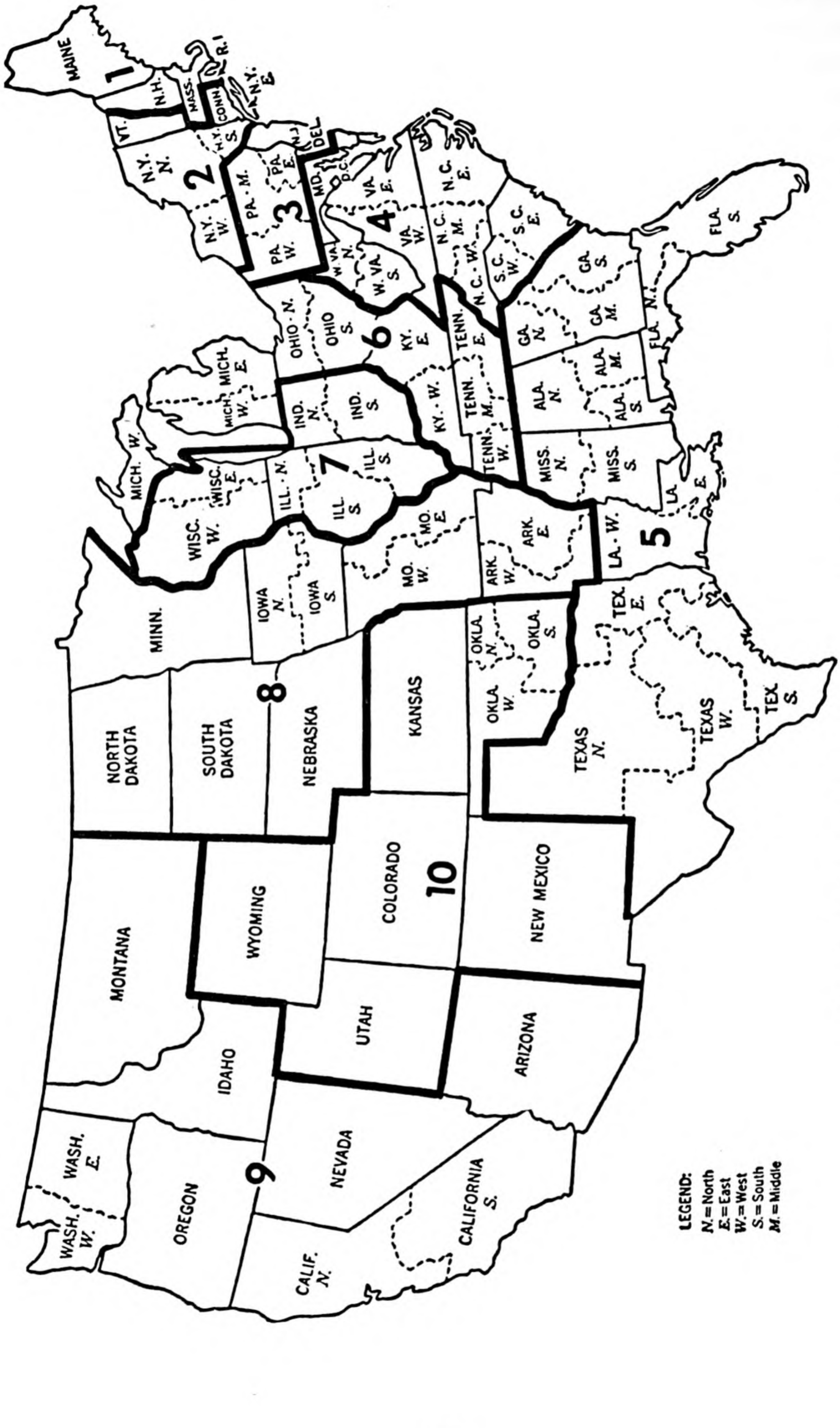
Since the Constitution guarantees the right of trial by jury in all criminal cases and in all civil cases involving more than twenty dollars, the district judge operates usually in connection with a jury of twelve persons which is chosen anew for the trial of each case. He supervises the process by which the proposed panel is screened to weed out persons who are biased one way or the other with respect to the case at hand. He supervises the presentation of evidence by counsel on each side. Each side, of course, attempts to secure the introduction of all material of benefit to it, whereas the other side attempts to bring about the exclusion of material which it regards as detrimental. The judge is the arbiter in the matter, deciding what questions may be asked and what answers may be permitted to go into the record which the jury is to consider in reaching its verdict. He does not, of course, act arbitrarily in such matters, or, at any rate, he has no legal right to do so. His duty is to follow well-established rules of evidence. If in making his decisions on the presentation of points of evidence he appears to lean too far in one direction or the other, counsel for the losing side will file what is called an "exception," on the basis of which an appeal can be taken to a higher court if the final verdict goes against his client.

After presentation of the evidence, which may require only a few hours or many days or even weeks, and after counsel on each side have summed up the evidence and its implication for the respective clients, the judge instructs the jury in terms of the law involved. He is the authority on matters of law. Members of the jury, on the other hand, are there to winnow the facts out of the mass of conflicting evidence. The judge indicates to the jurors how they are to define their verdict if perchance they find the facts to be one thing or another. In criminal cases the defendant goes free if the verdict of the jury is "not guilty." If the verdict is "guilty," or guilty of a crime at a given level, the judge then selects and applies the penalty within such area of discretion as the law allows him. In civil cases he also issues orders pursuant to the law which prevails when the facts are those which the jury finds them to be.

There are, of course, variations from this general pattern. Under certain circumstances the judge may so instruct the jury as virtually to determine the verdict. Under certain circumstances he may set aside the verdict as contrary to the evidence. Furthermore, there are areas of operation in which participation of the jury is not required. A jury does not participate, for example, when a judge is asked to issue an injunction against a strike or other activity which may do irreparable damage to property or to the national interest. The judge hands down his decision in such matters after hearing arguments of counsel, thereby often wielding tremendous power over the interests involved. If his command is disobeyed, the offender may be haled before him and sentenced to fine or imprisonment for contempt of court. Here again, with certain exceptions prescribed by statute, he operates without the aid of a jury. Such action may be necessary in a critical situation. Because it represents great concentration of power, however, and because the use of that power may be influenced by deeply ingrained prejudices, "government by injunction" is widely feared and much condemned.

The Circuit Courts of Appeals. Between the district courts and the Supreme Court are the circuit courts of appeals. Apart from the District of Columbia, the United States is divided into ten circuits. Some circuits have three circuit judges and others have six. Circuit court is usually held with three judges participating. Practically all their work may be regarded as dealing with appellate rather than original jurisdiction, although some of their cases come to them from the independent regulatory commissions and other agencies in the executive branch of the government which are not traditionally regarded as courts. Circuit judges do not work with juries, and they are concerned primarily with questions of law rather than with finding of fact. Their positions carry somewhat more prestige than those of district judges, and promotions are occasionally made from district courts to the circuit courts of appeals.

The primary function of the circuit courts of appeals is to relieve the Supreme Court of some of the burden of appellate work. Some kinds of questions which may be appealed from the district courts to the circuit



THE FEDERAL JUDICIAL CIRCUITS AND DISTRICT COURT AREAS

courts of appeals cannot be carried onward to the Supreme Court at all. Others can be, after going through the process of refinement which is involved in the exercise of appellate power by the circuit judges. It should be noted, however, that certain types of cases arising out of the Interstate Commerce Act and the anti-trust acts and oftentimes tried initially by courts consisting of three district judges may be appealed directly to the Supreme Court without passing through the circuit courts of appeals at all.

There was a time when the justices of the Supreme Court "rode circuit," that is, were assigned to judicial circuits and held circuit court throughout the country in addition to sitting as members of the Supreme Court. Although they have not ridden circuit since the early 1890's, they still have vestiges of responsibility for circuit business. Each of the ten circuits, for example, and also the District of Columbia, is assigned to a member of the Supreme Court who has a limited amount of responsibility for it. The Chief Justice, furthermore, presides over a conference of the senior circuit judges from the various circuits which meets in Washington at least once each year. The purpose of this judicial conference is to survey the work of the federal judicial system and to make recommendations as to how the work might be done with more dispatch, so that dockets might be kept more adequately cleared. The conference makes recommendations as to the shifting of judges from point to point in order that accumulations of business in particular areas may be dispatched. One of the important results of the conference is to create a sense of unity among the various courts throughout the country, which otherwise tend to operate as completely atomistic agencies except when conflicting decisions on points of law are harmonized by the action of the Supreme Court in deciding cases appealed from courts below.

Special Federal Courts. In addition to the Supreme Court, the circuit courts of appeals, and the district courts, various other courts fit more or less loosely into the federal judicial system. Some of them, like the courts already discussed, have their basis in Article III of the Constitution. Others, which are sometimes called "legislative courts," have their basis in other constitutional powers such as that of Congress to govern territories. Since the legislative courts are not based on Article III, they are not subject to its restrictions that appointments should be for good behavior, that salaries should not be diminished during the term of office, and so on. The courts of the several territories are in this category. The courts of the District of Columbia were once so classified but now tend to be regarded as "constitutional" rather than "legislative courts." Prominent among the special courts are the Court of Customs and Patent Appeals, the Court of Claims, and the Tax Court. They are in part judicial and in part administrative tribunals with jurisdiction indicated by their titles. Like many other agencies of government, they tend to merge the subject matter of widely different fields, in this instance, judicial and administrative subject matter, and are therefore not to be completely classified within either category.

Although much is said about the difficulty of work in highly technical fields by judges who, while experts in law, are not experts in the subject matter with which law deals, the United States has made little use of purely judicial tribunals which have jurisdiction over only specialized subject matter. During the presidency of William H. Taft, it is true, Congress did provide for a Commerce Court which had jurisdiction over railroads under the Interstate Commerce Act. For various reasons, however, that court was short-lived and its reestablishment has not been seriously considered. During the period of World War II, Congress created under the Emergency Price Control Act of 1942, an Emergency Court of Appeals to handle litigation under the act. The court consisted of three or more judges designated by the Chief Justice of the United States from among district and circuit judges already appointed. The court handled a tremendous amount of business while the act was in full force, but the special circumstances of war made it hard to generalize from this tribunal to others which might be created according to a similar pattern. It apparently worked well in the sense that it kept within the hands of a single tribunal cases arising under a single statute which would otherwise have been decided by large numbers of district courts scattered all over the country. It brought about a uniformity of decision with respect to the subject matter which could otherwise have been attained only after appeals had been taken to the Supreme Court.

THE BUSINESS OF FEDERAL COURTS

The Lower Courts — Civil Cases. The work of the federal judiciary which begins with the district courts is divided into civil and criminal cases. The civil cases, furthermore, can also be divided into two categories. In the first, the United States government is one of the litigants, while in the other, both are private parties. The character of the mass of litigation initiated by the United States varies from time to time depending on prevailing circumstances. During World War II, a substantial bloc of such litigation was initiated by the Office of Price Administration in enforcement of the price control act. During the same period, furthermore, the federal government was taking over so much land for wartime use that the group of land condemnation cases loomed large. Various other federal statutes were also being enforced, but anti-trust cases, which in normal times provide at least a distinguishable grouping, virtually disappeared because of the policy of government not to risk interference with business operations in any way that might curtail war production.

The cases in which the United States is defendant are always likely to be fewer than those in which the United States is plaintiff. They include habeas corpus cases, that is, cases in which it is contended that a person is illegally held by the government; tax suits, which usually involve contentions that taxes have been illegally collected; and various others.

The cases in which private parties are litigants on both sides fall into three principal groups. The first is that in which some federal question is

involved; that is, a right against a private party is claimed under a federal law, as when an action is instituted under the Fair Labor Standards Act, the Employers' Liability Act, or some other measure. The second major grouping of private litigation arises out of what is called "diversity of citizenship." That is, the case gets into the federal court not because the law involved is federal law but because the parties are citizens of different states. The Constitution, as discussed in the preceding chapter, authorizes Congress to give the federal courts jurisdiction in such cases to insure that the parties get more adequate justice than might be available in the state courts. The third group is in the field of admiralty jurisdiction, which the Constitution allocates to the federal judiciary. Admiralty cases involve various kinds of legal business arising on the high seas and on the navigable waters of the United States.

Criminal Cases. The criminal business of the federal courts also varies with circumstances. During the late 1920's and early 1930's, an enormous amount of that business had to do with violations of the federal prohibition act. During World War II, the Selective Service and Training Act and various other war measures provided the basis of a great deal of action. Statutes of continuing importance in this field have to do with the collection of internal revenue from the manufacture and sale of liquor, the theft of automobiles and other property moved in interstate commerce, the sale of narcotics, the white slave traffic, immigration, the postal service, and various other subjects. By and large, the federal courts are free from the mass of petty litigation which usually preoccupies and oftentimes seems to degrade state courts of original jurisdiction. Operations under the federal prohibition act prior to the repeal of the Eighteenth Amendment provided an exception; they detracted greatly from the dignity of the federal courts as cases involving bootlegging, racketeering, and related forms of criminal activity were processed. The desire to restore the federal courts to their former dignity provided one of the many motives for the abolition of national prohibition.

The Business of the Supreme Court. The original jurisdiction of the Supreme Court is prescribed by the Constitution and cannot be changed by Congress. Such cases are so rare that an entire term may pass without the institution of a single case. Those that do arise usually involve suits brought by one state against another over disputed boundary lines or over the right to the use of navigable streams flowing through the two states or such suits as those brought by states against alleged combinations in restraint of trade under the anti-trust laws. In such cases it should be noted that even though the trial takes place in the Supreme Court without previous action in a lower court, the Supreme Court almost never summons a jury for the finding of facts. Rather it in some cases appoints what is called a master, who, pursuant to prescribed rules, takes the necessary testimony and submits a record of it to the Court.

The appellate jurisdiction of the Supreme Court, which makes up most of its business, is subject to limitation by Congress. Although the cases must come from lower federal courts or from state courts, so that the jurisdiction is in part determined by the character of the business handled by the courts of original jurisdiction, Congress can and does greatly curtail the responsibility of the Supreme Court for the hearing of cases on appeal. There are certain kinds of cases, it is true, involving questions of constitutionality, which the Supreme Court is required to hear. For a great deal of other litigation, however, as for example that which involves merely the interpretation of a federal statute and not a question of its constitutionality, Congress has given the Supreme Court the right to exercise its own discretion as to whether it will hear the case. Cases in which the Court may exercise its discretion are brought up by a procedure known as the writ of certiorari, as distinguished from the writ of appeal which now prescribes procedure in cases on which the exercise of discretion is not allowed.

The decision of the Supreme Court to hear or not to hear argument in a case is supposed to depend, not upon the importance of the case to the litigants, but upon the importance of the service which will be rendered to the country by a Supreme Court determination of the question involved. Cases of this kind which the Supreme Court customarily hears include those in which the circuit court of appeals of one circuit will have interpreted a federal statute in one way while the court of another circuit will have interpreted it in another way, thereby leaving the point of law in a state of confusion. Decision by the Supreme Court settles the point of law, with the result that lower courts thereafter adhere to the determination of the Supreme Court. By the exercise of discretion in the selection of cases, the Supreme Court uses its time as well as possible. The need for carefully restricted exercise of the discretionary power of the Supreme Court is well explained in the following quotation from a dissenting opinion by Justice Frankfurter in a case which he thought ought to be sent back to the circuit court of appeals for final determination.

> To remit a controversy like this to the circuit court of appeals where it properly belongs is not to be indifferent to claims of importance but to be uncompromising in safeguarding the conditions which alone will enable this Court to discharge well the duties intrusted exclusively to us. The tremendous and delicate problems which call for the judgment of the nation's ultimate tribunal require the utmost conservation of time and energy even for the ablest judges. Listening to arguments and studying records and briefs constitute only a fraction of what goes into the judicial process. For one thing, as the present law reports compared with those of even a generation ago bear ample testimony, the types of cases that now come before the Court to a considerable extent require study of materials outside the technical law books. But more important, the judgments of this court are collective judgments. Such judgments presuppose ample time and freshness of mind for private study and reflection in preparation for discussions in Conference. Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that mature and fruitful interchange of minds which is indispensable to wise decisions and luminous opinions.

It is therefore imperative that the docket of the Court be kept down, that no case be taken which does not rise to the significance of inescapability for the responsibility entrusted to this Court. Every case that is allowed to come here which, judged by these standards, may well be left either to the state courts or to the circuit courts of appeals, makes inroads upon thought and energy which properly belong to the limited number of cases which only this Court can adjudicate. Even a judge of such unique gifts and experience as Mr. Justice Holmes felt at the very height of his powers, as we now know, the whip of undue pressure in his work. One case is not just one case more, and does not stop with being just one more case. Chief Justice Taft was not the last judge who, as he said of himself, "having a kind heart, I am inclined to grant probably more [discretionary reviews] than is wise." [3]

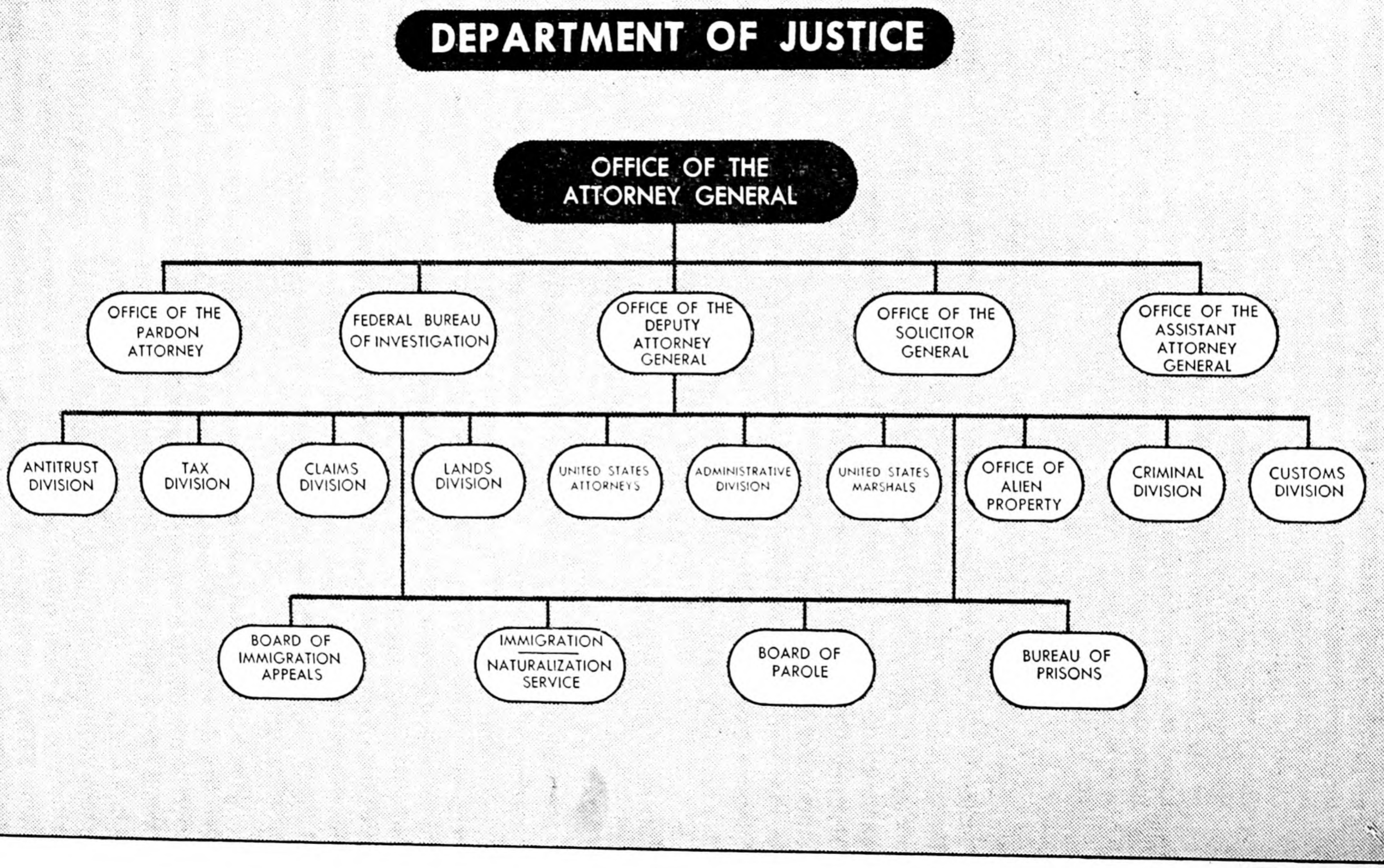
THE DEPARTMENT OF JUSTICE

Closely tied in with the work of the federal courts is the Department of Justice — a big department, though with many functions not directly connected with the operation of the federal courts. Although that department was not fully organized until 1870, it had its beginnings in the Office of the Attorney General, which was established in 1789. It was originally the function of the Attorney General to give legal advice to the President and to the heads of departments, and to argue government cases before the Supreme Court. The business was so light during the early years that the Attorney General had ample time in addition for the argument of private cases as a member of the bar. When the Department of Justice was established to bring together under one head large numbers of legal functions which had grown up throughout the government, the Attorney General was made head of the department. He continued for a time to argue the more important government cases before the Supreme Court but, as his administrative functions increased, that task was gradually allocated to other government lawyers. This work is now supervised by the Solicitor General, who argues some of the important cases himself and delegates the others to subordinate attorneys. The department maintains divisions and bureaus for the expert handling of legal business arising in connection with the anti-trust laws, laws connected with the acquisition or utilization of land by the government, tax laws, criminal laws, patent laws, the operation of federal prisons, and various other types of subject matter.

United States Attorneys and Marshals. The Department of Justice also reaches downward to supervise governmental litigation in the lower federal courts. In the instance of federal anti-trust laws and other statutes which are being enforced pursuant to a centralized policy, the Department often sends out special counsel to handle particular cases. The mass of government litigation, however, is handled in the lower courts by United States attorneys who are appointed in each judicial district with Senate confirmation. These appointments are almost always political in character and are made in connection with the issues of local politics, or rather in the light

3. *Ex Parte Republic of Peru,* 318 U.S. 578, 602–03 (1943).

DEPARTMENT OF JUSTICE



of the local interests of national politicians; but they are subject, nevertheless, to supervision from the Department of Justice. A United States marshal is also appointed in each judicial district. The marshal and his deputies handle such police matters as must be handled in connection with court operations. He takes offenders into custody and may bring them before United States commissioners, who may prescribe that they be held pending action by a grand jury. The United States attorney and his assistants bring before grand juries evidence of probable guilt and seek to secure indictments. Upon indictment, these officials prepare the government cases and handle them in court except as assisted or superseded by special counsel sent by the Department of Justice. They are sometimes superseded because of lack of equipment or ability for the handling of particular kinds of cases and sometimes because for political reasons they seek to escape responsibility for the prosecution of cases which might stir deep antagonisms in their community. Relations between these local federal officers and the department in Washington vary greatly on the basis of personalities, location, and events. Through it all, however, there is a loose form of organization, and the organization in turn, although in part executive and administrative, is closely related to the system of federal courts.

The Federal Bureau of Investigation. Back of the handling of litigation, particularly on the criminal side, is the growing function of investigation. The Federal Bureau of Investigation is a highly skilled fact-finding agency which accumulates evidence for the use of grand juries and prosecutors. It is not, of course, the sole governmental agency for the collection of such evidence. The Secret Service in the Treasury Department and the investigative agencies of the postal and military services perform similar functions. The FBI, however, is the Justice Department's own agency in this field, and its operation is much more closely related to law enforcement in the courts than are the operations of other investigative agencies.[4]

THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Any government organization, whatever the nature of its functions, has a certain amount of routine business connected with it, such as the provision of quarters, the employment of custodial and other subordinate personnel, and so on. In connection with the federal courts, the value of the accumulation of statistics about the various kinds of legal business handled, the status of the several dockets, and various other items, has long been recognized. From the accumulation of some of this information, conclusions may be reached as to the number of judges needed, the desirability of shifting judges from point to point, and other matters. For many years the Department of Justice performed these functions. Finally, however, the department came to the conclusion that, because it was one of the principal

4. See J. Edgar Hoover, "Hoover Answers Ten Questions on the F.B.I.," *New York Times Magazine,* April 16, 1950.

litigants before the federal courts, it ought not to have even this limited amount of supervision of their operations. On the recommendation of the department, therefore, Congress provided for the appointment of a director of the Administrative Office of the United States Courts and provided him with a limited budget for the performance of these and related functions. The office works in conjunction with the judicial conference of senior circuit judges mentioned above, providing the conference with some of the information on which its recommendations are based. It seems apparent, however, that the ultimate scope of the work of the office, particularly in so far as it may exert some influence on the performance of judicial functions, remains yet to be determined.

Such, in brief, is the overall picture of the federal judicial system, presented without painting in the enormous amount of varying details which lend color and interest but which, at this point, might tend to confuse rather than clarify. The system is one which, like common law judicial systems wherever they are found, is created to achieve the fundamentals of justice and to eliminate as fully as possible the errors which tend to corrupt and to pervert all human institutions. It is built upon assumptions about law and justice which must be more fully articulated if the essence of the system, as distinguished from its mechanism, is to be properly understood. The following chapter, therefore, will turn more directly to the kind of thought which has given rise to our judicial institutions and which continues to condition their operation. It will deal also with the effects of changing patterns of national living and thinking upon the further development and utilization of the traditional judicial pattern.

References

Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921).

Edward S. Corwin, *Court over Constitution; a Study of Judicial Review as an Instrument of Popular Government* (Princeton University Press, 1938).

———, *The Twilight of the Supreme Court; A History of Our Constitutional Theory* (Yale University Press, 1935).

Homer Cummings and Carl MacFarland, *Federal Justice* (Macmillan, 1936).

Charles P. Curtis, *Lions Under the Throne* (Houghton Mifflin, 1947).

R. E. Cushman, *The Supreme Court and The Constitution* (Public Affairs Committee, rev. ed., 1940).

John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (Harvard University Press, 1927).

William O. Douglas, *On Being an American* (John Day, 1948).

Charles Fairman, *Mr. Justice Miller and the Supreme Court, 1862–1890* (Harvard University Press, 1939).

Jerome Frank, *Courts on Trial* (University of Princeton Press, 1949).

John P. Frank, *Mr. Justice Black, the Man and His Opinions* (Knopf, 1949).

Felix Frankfurter and James M. Landis, *The Business of the Supreme Court* (Macmillan, 1928).

Charles G. Haines, *The Role of the Supreme Court in American Government and Politics, 1789–1835* (University of California Press, 1944).
George S. Hellman, *Benjamin N. Cardozo — American Judge* (McGraw-Hill, 1940).
Willard L. King, *Melville Weston Fuller, Chief Justice of the United States* (Macmillan, 1950).
Samuel J. Konefsky, *Chief Justice Stone and the Supreme Court* (Macmillan, 1945).
———, (ed.), *The Constitutional World of Mr. Justice Frankfurter; Some Representative Opinions* (Macmillan, 1949).
Wesley McCune, *The Nine Young Men* (Harpers, 1947).
Joseph E. McLean, *William Rufus Day: Supreme Court Justice from Ohio* (Johns Hopkins Press, 1946).
Alpheus T. Mason, *Brandeis, a Free Man's Life* (Viking, 1946).
Robert L. Stern and Eugene Gressman, *Supreme Court Practice* (Lawyers Coop. Publishing Co., 1950).
Carl B. Swisher, *The Growth of Constitutional Power in the United States* (University of Chicago Press, 1945).
———, *Roger B. Taney* (Macmillan, 1936).
———, *Stephen J. Field, Craftsman of the Law* (Brookings, 1930).
Arthur T. Vanderbilt, *Minimum Standards of Judicial Administration* (Law Center of New York University, 1949).
Charles Warren, *The Supreme Court in United States History,* 2 vols. (Little, Brown, rev. ed., 1937).
Mitchell Wendell, *Relations Between the Federal and State Courts* (Columbia University Press, 1949).
Charlotte Williams, *Hugo Black* (Johns Hopkins Press, 1950).

21

The Character and Kinds of Law

In the preceding chapters much has been said about law. We have discussed constitutional law, statute law, and administrative law, and mention has been made of treaties as law, of common law, and international law. Other terms, such as natural law, equity, and admiralty law also belong in the picture. Some of these categories of law have very different meanings one from another, and even within a single category the differences are enormous. There is little resemblance, for instance, between a statute authorizing the construction of a bridge and another providing for aid to Europe. There is little resemblance between a judicial decision interpreting a taxing statute and one interpreting the scope of liberty under the Fourteenth Amendment. In administrative law, there is little similarity between an administrative ruling of the Federal Trade Commission defining "unfair trade practices" and a presidential order under the Reorganization Act of 1949 taking power from the general counsel of the National Labor Relations Board.

So great, indeed, is the variety of subject matter classified as law that it is often hard to find any common core for the term. We can find general or "universal" meaning in it only as we contrast it with clearly nonlegalistic subject matter. As was said earlier in connection with statute law, the subject matter of political science can be classified in terms of politics, law, and administration. Politics is the play of human forces as individuals and groups struggle to get what they want within and from society. Administration is the process of wielding governmental organization according to the pattern agreed upon. Law is the area of agreement which the people, or the people in power, have reached about what will be done and how it will be done. Law represents the "settledness" of society. The content of law is determined through the processes of politics, it is carried into effect through the processes of administration, and disputes concerning its meaning are finally resolved through the judicial process. The three processes are so interrelated that there is no separating them, yet the differences are there.

If law is the "settledness" of society, it is primarily that "settledness" which government will preserve by using the force at its command. It con-

sists of that which must be done if penalties are to be avoided. Some of it, as for example a provision of the Constitution, can be changed only with great difficulty. Other parts of it, such as an order of the Secretary of Agriculture on fire protection in a national forest, can be changed with relative speed and ease. In the ease with which they can be changed, statutes fall between the Constitution at the one extreme and administrative orders at the other. Yet the difficulty or ease of changing law is not to be measured exclusively by whether the law is in the form of a constitution, a statute, or an administrative order — to leave unmentioned for the moment treaties, common law, and other categories of law. Some proposed constitutional amendments have been enacted speedily and easily, others have come slowly, and still others have failed of adoption. Some statutory provisions can be changed easily and without debate, whereas others have some of the seeming sanctity of the Constitution. Some of the rules of administrative agencies can be changed without difficulty, whereas changes in others would bring so much protest from people having a vested interest in the stability of the rules that change would be a serious matter.

Defining law as the "settledness" of society which government will preserve by the use of force does not therefore explain why some things become settled more firmly and more unchangeably than others or why some things become settled and others do not. Philosophers and jurists have speculated on these problems from time immemorial and have agreed and disagreed endlessly without giving mankind an easily comprehensible explanation. In view of the complexity of the subject, perhaps no such explanation should be expected. Yet in every society the phenomena of law are so important that the thoughtful student of government must try to understand them. The purpose of this chapter is to make the concept of law as clear as may be, or at any rate to throw more light on important aspects of it.

THE MEANING OF LAW

Law as "Natural." From the time of the ancient Greeks, students of law have looked for its explanation in a pattern in nature. They have talked about fundamental principles in nature or "natural law," to which man-made or "positive" law must conform. Although today, as distinguished from a century ago, it is apparently bad form for lawyers and judges to talk in terms of natural law, such concepts underlie our existing legal structure and must be taken into account whatever the critic thinks of their validity. The framers of the Declaration of Independence were steeped in the concepts of natural law and believed in natural rights which were derived from or protected by principles of natural law. As they phrased it, the American people were assuming among the powers of the earth the equal station "to which the laws of nature and nature's God" entitled them. They proclaimed as a self-evident truth that all men were endowed by their Creator with "certain unalienable rights." In talking about the laws

of nature and about unalienable rights they were not presenting new doctrine but were harnessing the conventional beliefs of the eighteenth century for their own purposes.

Those beliefs with their ancient roots were discussed in terms of the broad pattern of existing law by Sir William Blackstone in his *Commentaries on the Laws of England*, written at about the time when the American colonies were tearing themselves away from the mother country to establish a new nation. In its many editions this work provided for a century or more the basic subject matter for the training of young American lawyers. It was true of Blackstone's doctrines, as of the pronouncements of the Declaration of Independence, that they were not new. They were compilations, rather, of most of what was then known and believed about the common law and the sources and nature of law generally.

To Blackstone the law of nature was very real. It was an embodiment of the will of God. The will of God found expression in two ways — first by divine revelation in the Scriptures and secondly through the processes of reason. The divinely revealed law, because of its freedom from error, was more perfect than law discovered through the reasoning processes of men, which were faulty at best, but whether it came through revelation or through reason, all natural law came from the same source. Since the law of nature was dictated by God himself, Blackstone held it to be superior in obligation to any other kind of law.

> It is binding all over the globe, in all countries, and in all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.[1]

Blackstone considered it a primary function of man-made law to provide for the implementation and enforcement of natural law. While human legislators might also make and enforce rules on indifferent matters not covered by natural law, it was natural law and the measures enacted in pursuance of natural law that called for most attention in the study of law.

Except as natural law was found in the Scriptures, the men best equipped to find out what it was were the judges. The judge was specially trained for its discovery. He read the decisions of his predecessors, he studied the customs of society, he found the principles of right and justice which lay at the base of the social order. Those principles, the embodiment of custom and morality, were the essence of the law of nature. In the light of this interpretation it is not surprising that, as discussed earlier, lawyers and judges trained in the intellectual school of Blackstone were hostile to legislation, whereby allegedly undisciplined legislators enacted statutes interfering with the pattern of natural law as the judges portrayed it. So it was that American lawyers and judges, brought up in the Blackstone tradition, long opposed anything more than the necessary minimum of legislative interference with the pattern of the common law. They would have

1. Sir William Blackstone, *Commentaries on the Laws of England*, vol. I, Book I, p. 41.

denied that they favored judge-made law as contrasted with law made by legislatures. Judges, they contended, did not make law; they only found it, by exercise of the disciplined processes of reason. They seem pretty much to have accepted the belief that judges had special powers of divination where the discovery of law was concerned.

American Judges and Natural Law. During the early years after the adoption of the Constitution, American state and federal judges from time to time frankly justified their decisions in terms of principles of natural law as expressed in earlier decisions. Even when a case turned on interpreting the federal Constitution, judges often seemed to feel more comfortable if, in addition to interpreting the relevant clause of the Constitution, they could show that the decision reached was consistent with or even dictated by some principle of natural law. In a concurring opinion handed down in 1810, for example, Justice Johnson refused altogether to go along with his colleagues in resting a decision on the contract clause of the Constitution. He reached the same conclusion as the majority of the Court, but did so "on a general principle, on the reason and nature of things; a principle which will impose laws even upon the deity." [2] In deciding another contract case in 1815, Justice Story, speaking for the Supreme Court, declared that

> we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the Constitution of the United States, and upon the decisions of most respectable judicial tribunals in resisting such a doctrine.[3]

In 1819 in his opinion for the Supreme Court in the famous Dartmouth College case, Chief Justice Marshall declared that a contract made in England by the governing power would thereafter have remained "sacred" even if subsequently repealed by an act of Parliament.[4] For Marshall a contract apparently had a measure of sacredness and hence a measure of force merely because it was a contract and not just because it had backing from government. This conception of sanctity apart from the power of government was a characteristic of natural-law thinking. Justice Story, in a concurring opinion in the same case, again revealed the pattern of his natural-law thinking when he spoke of a principle of the common law as "equally consonant with the common sense of mankind and the maxims of eternal justice." [5]

Supreme Court opinions of the Marshall period, and to a lesser extent for some decades thereafter, are thickly sprinkled with references to natural law as the source of the principles which were applied by the Court. At about the time of the Civil War, however, there began an important change in the process of rationalizing new decisions. References to natural law

2. *Fletcher* v. *Peck,* 6 Cranch 87, 143 (1810).
3. *Terrett* v. *Taylor,* 9 Cranch 43, 52 (1815).
4. *Dartmouth College* v. *Woodward,* 4 Wheaton 518, 643 (1819).
5. *Ibid.,* p. 707.

and to fundamental principles became less and less frequent. Instead the Court depended more and more on two other sources of authority. The first was the specific language of the Constitution, which by this time had achieved such sanctity that it was unnecessary to hunt back to allegedly underlying principles for psychological support. The second was the growing mass of Supreme Court decisions which had already been handed down by the Supreme Court upon which succeeding decisions could be based. During the chief justiceship of John Marshall there were relatively few Supreme Court decisions on which the Court might rely, with the result that it was driven toward reliance on general principles. Now, with a rapidly accumulating body of precedents, it could cite and quote from long lists of relevant cases. The tendency, therefore, during the last quarter of the nineteenth century and thereafter, was to proceed more and more in terms of case law and less in terms of doctrinaire statements. Some statement of doctrine was continued, it is true, although increasingly it was doctrine with respect to constitutional interpretation rather than with respect to fundamental principles of justice. But the use of previously decided cases became so extensive that the body of case materials began to be the predominantly determining factor. Those judges who resorted at all to the discussion of principles could always dodge behind a bloc of precedents when the logical shooting got too heavy.

Law and Utility. Even in the time of Blackstone there were thoughtful people who denied his pious assumption that by and large the existing body of law as voiced by common law judges reflected the will of God and marked the path to social justice — with corrections here and there for the fallibility which characterized even the wearers of judicial robes. Jeremy Bentham, one of Blackstone's pupils, won widespread attention by his indignant and scornful criticism of Blackstone's optimistic and dogmatic assumptions. He looked at the slums of English cities and the misery among workers in English industry and concluded that good citizens must not be content with waiting for the slow adjustments of common law to bring the law into harmony with social needs. He denounced the common law as obsolete and demanded the enactment of widespread legislation based on the principle of utility.

Bentham came to be known as the founder of the utilitarian school of thought which developed its principles through the reasoning of James Mill, John Stuart Mill, and others. In a sense, indeed, he may be regarded as the father of pragmatism, which in the latter part of the nineteenth century came into popularity in the United States under the intellectual leadership of William James. The utilitarians looked not primarily to bodies of doctrine buried in judicial decisions but to the actual relations of men in society. They urged the molding of government in such a way as to achieve the greatest good of the greatest number. They had no use for the verbiage of natural law.

Perhaps it should be said however, that the utilitarians were not as far

from belief in the fundamental importance of natural law as they thought. The followers of Blackstone not only assumed the existence of a body of natural law but identified its content with the interpretations handed down by common law judges. In actuality, it was these particular interpretations of natural law rather than the existence of fundamental principles which the utilitarians rejected. They accepted, for example, the postulate that government ought to provide for the greatest good of the greatest number. Upon that postulate and related assumptions it would be possible to rationalize a system of natural law. It would be different in its content, or at any rate in its emphasis, from the system of Blackstone, but even so it would be of the pattern of natural law. This fact the utilitarians apparently did not recognize, choosing, as has been said, to identify natural law with the particular content given to it by the natural-law thinkers of the time.

Since the utilitarians were concerned with utility here and now as measured, apparently, by common sense observation and assumption, the utilitarian approach fitted well into the developing pattern of American social thought. Industrialization in the United States, and the development of new economic opportunities, were coming so rapidly that changes in law could no longer wait upon the slow process of judicial rationalization. There was no time for philosophical placement of events, ideas, and beliefs in relation one to another. Utilitarianism developed into pragmatism, a kind of philosophy of workability which with its emphasis upon facts in every situation gave a measure of philosophical comfort without the price in time and energy which must be paid for the development of elaborate philosophical systems.

The pragmatic approach, the approach which emphasized the need for careful examination of the facts in every situation in which action was called for, harmonized well with acceptance of legislation as a process of making law, as distinguished from judicial interpretation and application of principles of law. It paved the way for a decline in the relative prestige of the judiciary, and for enhancement of the prestige of legislative and administrative processes. Pragmatism played its part also in bringing about the change in the character of the judiciary as described above. In theory the natural-law jurist had been concerned primarily with the proper interpretation and development of fundamental principles of law. Actually, it is true, he had as a rule kept one eye fixed upon the application of principles as a means of verifying his interpretation of them. The more pragmatic jurists of the past half century have likewise kept one eye upon the actual results of decisions, but the other has been fixed not so much upon principles of natural law as upon the body of previously decided cases. Although principles have not been altogether ignored, they have appeared as fragments, as interstitial statements in the midst of discussions of the way in which decisions in new cases were determined by cases previously decided.

In a sense, it is true, natural law has not been abandoned but has merely

been driven underground. Judges who in an earlier period would have talked of natural law, natural justice, divine law, fundamental principles of justice, and so on, have submerged their beliefs in these subjects by resort to such concepts as due process of law, reasonableness, arbitrariness, equality, fairness, and capriciousness.[6] These terms, which were never defined, were used as vehicles for reading into judicial decisions the judges' conception of fundamental principles without admission that the process of rationalization was essentially the process of natural law. Partly because the terms were never adequately defined, and never adequately related to one another, they stood in the way of the development of an integrated theory of law. True, the development of law through judicial decisions did conform to a kind of pattern. Until the New Deal period the pattern was that of extensive judicial restraint upon governmental interference with rights of property, a restraint which slowly yielded to social pressure, however, as the necessities of the time compelled the exercise of more and more governmental control. This pattern has been discoverable, however, not so much through elucidation by the judges who wrote the majority opinions as through the survey and independent appraisal of the mass of decisions with help at times from the comments of dissenting judges.

The Case Method. Philosophy drifted toward pragmatism through increased use of the legislative process, and judicial decisions placed increased emphasis on previously decided cases with diminished attention to statements of principle. It was consistent with these changes that during the last third of the nineteenth century the method of teaching law in law schools shifted from emphasis on commentaries such as those of Blackstone, Kent, and Story, to emphasis on selected judicial decisions. The case method, introduced at Harvard University by Professor Christopher Langdell, spread gradually throughout the country. It paved the way for the easy conclusion that law is not to be regarded as the product of fundamental principles, but rather as what judges in individual cases find it to be. Law was considered less and less as a body of related principles and more and more as an aggregation of statements on particular legal points in particular cases. By implication the judiciary lost status as a dignified profession searching for an underlying pattern of fundamental principles, and became more and more a group of men handing down their individual judgments about what law should be held to be in individual cases.

It may well be that, in a rapidly changing society, teaching law in terms of statements of principle worked out a long time ago and not adequately modernized had become so barren that the case method brought it new life. The new system brought a barrenness of its own, through its atomization of the law, however, and in recent years it has been denounced as the source of barrenness of still another kind. It brought the illusion that the student of law needed to know little outside the published decisions. It did

6. For discussion of the use of such terms see Charles G. Haines, *The Revival of Natural Law Concepts* (Cambridge: Harvard University Press, 1930), pp. 232–34.

not take students into courts to watch the trial of actual cases, and did not reveal judicial decisions as the product of the total experience of the trial. It put all its emphasis on judicial rationalization of the law after the judge had made up his mind how he wanted to decide the case. Law and life, therefore, or life and law as law was revealed by the materials studied, had only feeble contacts with each other.[7]

Legal Realism. In general, American attitudes toward law moved from an emphasis on natural law through utilitarianism and pragmatism in the direction of what has come to be known as legal realism. Realism in this sense implied disillusionment with and the disintegration of idealism. Judges were reduced to men, and law was reduced to what judges decided in particular cases. For some commentators cases were reduced to the points actually decided, and lengthy discussions in judicial opinions were characterized as largely irrelevant. This latter position, it is true, has thus far been taken only by extremists, but it is characteristic of the direction in which much of our thinking about law has developed in recent years. Pushed to its extreme, it brings judges down to the level of other statesmen or politicians who determine the content of law merely on the basis of their conception of what ought to be. Some have gone so far as to talk of what they call "gastronomic jurisprudence," suggesting that the judge's decision in a particular case may well be affected by what he drank the night before or by what he had for breakfast.

Few people would seriously pretend that the judicial process has been atomized in this fashion, or that the condition of the judge's stomach at the time has very much to do with the shaping of his decision. In a great many areas of the law the legal pattern is sufficiently clear that decisions in new cases are almost automatic, provided that the facts involved can be made similarly clear. Furthermore, in spite of the abandonment of natural-law terminology, many judges still believe in the vitality of principles found in the Constitution and in other judicial decisions as guides to new decisions. Some of them, in their capacity as judges, try very hard to maintain aloofness from popular sentiment whipped up for the moment by special interests, and to short-circuit any personal prejudices which would interfere with fair and just decisions. In constitutional matters, the lower federal courts and the state courts get a measure of guidance from the Supreme Court of the United States, which has the final word in interpreting the Constitution. The Supreme Court, unfortunately, has no higher tribunal to give it guidance, and its task is made more difficult by the fact that it must often decide cases for which there are no adequate precedents. This has left the Supreme Court peculiarly vulnerable to attack from the point of view of legal realism.

The Supreme Court and the Judicial Process. The greater and more rapid

7. See Jerome Frank, *Courts on Trial* (Princeton: Princeton University Press, 1949), Chapter XVI.

the changes in the social and economic order, the more difficult is the task of the Supreme Court in interpreting the Constitution in the light of current needs. Because change seems to be coming with ever-accelerating speed, the task of the Court is therefore one of ever-accelerating difficulty. Critics of the Court differ sharply about its proper function. Those, for example, who oppose the extension of the power of government over property, whatever the changes in the economy, think the Court ought to block the extension of governmental power by holding statutes unconstitutional. On the other hand, those who believe that the exercise of governmental power must be expanded with changes in the economy think that the Court should rationalize into the constitutional system each new regulatory measure as it comes along.

Although the Supreme Court never stood as an absolutely rigid barrier to the expansion of governmental power, the majority of its members between the 1890's and the 1930's aligned themselves on the conservative side. Deciding new cases in terms of old ones, they tried to maintain constitutional stability in the face of broad transformation of the economic order. For some thirty years Justice Oliver Wendell Holmes, who joined the Court in 1902, pricked at his brethren in opinion after opinion, reminding them and the general public that individual prejudice played too large a part in judicial determination of what was constitutional. In 1916 he was joined by Louis D. Brandeis, who repeatedly reminded the Court and the public that constitutionality was to be discovered by a search for proper relationships between the Constitution and the laws on the one hand, and the social and economic order on the other. These two justices were joined in the middle 1920's by Harlan F. Stone. "Holmes, Brandeis and Stone dissenting," became the label of liberal criticism of the conservative side of the Court. It is doubtful whether that criticism had any important effect upon the then current majority of the Court other than to solidify the majority in the face of opposition. It did, however, have a pronounced effect upon the thinking of open-minded people about the proper sphere or function of the judiciary. It led a great many people to the conclusion that the Supreme Court as then constituted was improperly performing its functions in many instances in which it stood firmly against adjustment of constitutional interpretation to the needs of the time. It was the liberals as well as the conservatives, in other words, who undermined the reputation of the Supreme Court in the thinking of the people.

The crisis in disagreement over the proper function of the Supreme Court was reached in the middle 1930's when the Court, usually sharply divided, held unconstitutional important New Deal measures which the administration regarded as essential to economic recovery. In one of these cases Justice Stone issued in a dissenting opinion the following warning:

> The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional

> exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government.[8]

The conservative members of the Court writhed under the implied accusation of improper exercise of unrestrained power. In their minds the Court exercised no power at all, but merely interpreted the Constitution in terms of its own understanding of that document. In a later case in which the conservative majority became the minority of the Court, Justice Sutherland delivered an indirect answer to Justice Stone:

> The suggestion that the only check upon the exercise of the judicial power, when properly invoked, to declare a constitutional right superior to an unconstitutional statute is the judge's own faculty of self-restraint, is both ill considered and mischievous. Self-restraint belongs in the domain of will and not of judgment. The check upon the judge is that imposed by his oath of office, by the Constitution and by his own conscientious and informed convictions; and since he has the duty to make up his own mind and adjudge accordingly, it is hard to see how there could be any other restraint.[9]

It seems improbable that any present member of the Supreme Court, or many critics of the judicial process, now regard the judicial function as the relatively passive one outlined by Justice Sutherland. In 1948 Justice Frankfurter discussed the judicial task in language indicating agreement with the position of Justice Stone. He spoke of doubts and difficulties which arise

> when this Court is obliged to give definiteness to "the vague contours" of "due process or, to change the figure, to spin judgment upon state action out of that gossamer concept. Subtle and even elusive as its criteria are, we cannot escape that duty of judicial review. The nature of the duty, however, makes it especially important to be humble in exercising it. Humility in this context means an alert self-scrutiny so as to avoid infusing into the vagueness of a constitutional command one's purely private notions. Like other mortals, judges, though unaware, may be in the grip of prepossessions. The only way to relax such a grip, the only way to avoid finding in the Constitution the personal bias one has placed in it, is to explore the influences that have shaped one's unanalyzed views in order to lay bare prepossessions.[10]

New Deal Supreme Court Changes. By its own behavior in standing in the way of important aspects of the New Deal program, and by criticism from without, the Supreme Court was sufficiently discredited that President Roosevelt thought it politically expedient to propose to Congress the enactment of a statute to "pack" the Court. That is, he proposed that the size of the Court be substantially enlarged in the hope that a group of carefully chosen new members would out-vote the conservatives and so protect the constitutionality of the New Deal program. The proposed statute was not

8. *United States* v. *Butler,* 297 U.S. 1, 78–9 (1936).
9. *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379, 402 (1937).
10. *Haley* v. *Ohio,* 332 U.S. 596, 602 (1948).

enacted, but the Court during the period when it was under fire made a slight shift in position so that important measures were held to be constitutional. During this same period one of the conservative members announced his intention of retiring at an early date. During the years immediately following, personnel changes took place rapidly and the older alignment among the justices completely disappeared. New justices appointed by Presidents Roosevelt and Truman have undertaken the task of bringing constitutional interpretation into harmony with the needs and sentiments of the times.

In *The Struggle for Judicial Supremacy,* published in 1941 just before he became a member of the Supreme Court, Robert H. Jackson characterized the achievements of the reconstituted Supreme Court in a chapter entitled "The Court Retreats to the Constitution." He stated in his preface that the turn which the Court had taken had been in the nature of a constitutional renaissance, a rediscovery of the Constitution itself.

> We are back to the original sweep and vigor of those clauses which confer power on the federal government, and those which limit it are reduced, if not to their original meaning, at least to tolerable approximations. And the national government has won a long fight to free itself from an unwholesome dominance of the vested private interests over the public welfare.[11]

It was then widely believed that since the 1890's the Supreme Court had departed from the true interpretation of the Constitution for the purpose of erecting protective barriers for *laissez faire* and preventing governmental interference with private enterprise which many people regarded as essential. There is reason to believe that a number of the new justices thought that with the overruling of a score of key decisions it would be possible to get "back to the Constitution" and rest subsequent decisions upon a correct interpretation of the fundamental document. Thereafter, the expounding of the Constitution could follow a relatively clear pattern upon which liberal and therefore largely unbiased justices could agree.

Although the score or more of allegedly erroneous decisions have long since been overruled, the new justices have unfortunately not been able to agree upon the location of the new constitutional highway. All of them want to get back to the Constitution, but they seem to have nine different sets of convictions as to where the new highway ought to be laid out. Seldom are important cases decided without dissenting opinions, and majority decisions are frequently reached only by the concurrence of judges who travel by different logical routes.

Some of the difficulties in getting agreement among the current members of the Supreme Court are difficulties of personality. Such difficulties can never be completely avoided. Seldom does a man of retiring and acquiescent personality get appointed to the Court. Appointments are made after ways of thinking and behaving have become well established, and after success in professional life has provided justification for self confidence.

11. Robert H. Jackson, *The Struggle for Judicial Supremacy* (New York: Knopf, 1941), p. xv.

Coupled with difficulties of personality are those which derive from sharply different conceptions of the nature of law and the function of the judiciary. The contrasting approaches of Justices Black and Frankfurter provide illustration. Justice Black is ever ready to strike a blow at the ugly head of tyranny wherever it raises itself, and he finds opportunities for tyranny in the judiciary as well as other branches of the government. When lower court judges encroach upon constitutional liberties by punishing for contempt newspaper publishers and others for commenting on the course of trials, Justice Black is likely to be more concerned about the preservation of liberty than about full protection of the immunities which judges must have in some degree for the performance of their judicial functions. He is particularly opposed to the use of natural-law concepts as a device for reading judicial prejudices into the Constitution. He challenges the position

> that this Court is endowed by the Constitution with boundless power under "natural law" periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes "civilized decency" and "fundamental liberty and justice." [12]

He contends that the natural law formula

> should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power.[13]

Justice Frankfurter, by contrast with Justice Black, is much concerned about preserving the integrity of the judicial system by means of protecting its immunities from outside interference. So it is that in contempt cases in which the constitutional line is hard to draw he is likely to be more concerned about the judicial system than about the liberties of outspoken critics. Although he is not inclined to talk specifically in terms of natural law and does not admit that he uses its terminology as a device for reading his own prejudices into law, he does seem to use the methodology which Justice Black criticizes. This is particularly true in his interpretation of what he calls the "gossamer concept" of due process of law. The correct interpretation of that clause, he contends,

> depends on an evaluation of psychological factors, or, more accurately stated, upon the pervasive feeling of society regarding such psychological factors. Unfortunately, we cannot draw upon any formulated expression of the existence of such feeling. Nor are there available experts on such matters to guide the judicial judgment. Our constitutional system makes it the court's duty to interpret those feelings of society to which the due process clause gives legal protection. Because of their inherent vagueness the tests by which we are to be guided are most unsatisfactory, but such as they are we must apply them.[14]

In a later case (see page 458), he declared that due process of law embodied "a system of rights based on moral principles so deeply embedded

12. *Adamson* v. *California,* 332 U.S. 46, 69 (1947).
13. *Ibid.,* p. 75.
14. *Haley* v. *Ohio,* 332 U.S. 596, 605 (1948).

in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history." To him it comported "with the deepest notions of what is fair and right and just." The more fundamental these beliefs were, the less likely they were to be explicitly stated. In enforcing them, nevertheless, "this Court does not translate personal views into constitutional limitations." What the Court did, rather, was to enforce "those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions." [15]

In the light of these two sharply different approaches to the subject matter of law, it is not surprising that Justices Black and Frankfurter disagree frequently on how cases should be decided. Nor is it surprising that if perchance they agree on the decisions, they disagree on how the opinion of the Court ought to be written. It is not, as a superficial examination might lead one to believe, merely a display of egotism which leads each justice to add to the bulk of the United States reports by writing dissenting or concurring opinions in cases in which the other acts as spokesman of the Court. Contrary to the more extreme of the legal realists, they regard judicial opinions and not merely judicial decisions as highly important. Each of them is concerned not only with getting cases decided but also with shaping the development of law. Other justices, if slightly less individualistic and rigid in their legal outlook, nevertheless have their own approaches to legal subject matter. It is quite understandably a difficult task to bring the nine of them into harmony both in deciding cases and in rationalizing their decisions.

The problems of the Supreme Court have still other shadings. Each of the present members was in some sense a national leader before his appointment to the Court. He has a sense of obligation to continue his leadership, but he lacks a line of argument sufficiently persuasive to convince his colleagues. The public has no conception of the amount of frustration which may well be currently suffered by the men who are seeking to fulfill their constitutional obligations. Apart from the reasons already given, that frustration is accentuated by the fact that the social and legal philosophy of the American people as a whole has not kept pace with the scope of change in their way of living. We have advanced piecemeal without a chart for the course of our evolution. As already intimated, the Supreme Court for a number of decades has followed the practice of other institutions in moving step by step without adequate awareness of the relation of the several steps one to another, or to any broad pattern of legal and social development. Nowhere on the horizon is there evidence of the adequate formulation of a national philosophy. If the Supreme Court were to formulate such a philosophy, it would have to do so largely on its own without coordination with similarly constructive efforts of other political and social institutions. In fact, institutions do not develop in isolation. Each must feed the intellectual life of the other and participate in the shaping of

15. *Solesbee* v. *Balkcom*, 70 S. Ct. 457, 461 (1950).

social philosophies and social patterns. The development of an intelligible pattern in one institution depends in no small part upon similar development throughout the society as a whole. It is the task therefore not merely of the Supreme Court, but of the leadership of all our primary institutions, to seek interpretations of our society which will give us a sense of integration and purpose with respect to all of its parts.

JUDICIAL REVIEW vs. ADMINISTRATION

Courts and Government Control. It is to be remembered that our tripartite system of government was set up to operate in a predominantly *laissez faire* regime, that it anticipated no extensive amount of government control over enterprise, and that it did not anticipate anything like the operation of modern total warfare. Government was expected to operate in a limited sphere of police activity. Under that early and simple regime it was possible through judicial processes to develop principles of law so as to do adequate justice at most points of contact between the government and the life of the people. All this has been changed with changes in the economy and in methods of warfare. The variety and complexity of governmental activity is now so great that courts are poorly equipped for the task of continuous and comprehensive supervision. To quote Walton H. Hamilton,

> The way of litigation is too expensive and cumbersome for everyday use. The values at stake cannot be crowded into the rigid forms of a case in controversy. The tempo is too slow for a world in a hurry; the channels are too narrow for the heavy traffic of a going business system. And it is not a review in the instant case which is most needed; it is rather to see to it that administration-in-action is held to approved lines of public policy. The courts measure human conduct by established norms; in administration the big question is to see to it that rightful standards are established — and maintained.[16]

Courts and Administration. As discussed in earlier chapters, Congress has in recent years been compelled to enact broad regulatory legislation whereby it leaves to administrators the working out of a great mass of administrative law which constitutes the rules of administration. Congress, in other words, has had to delegate to other agencies the making of part of the body of written law. So also the courts have had to watch part of their traditional function passing from them. Where government regulations are involved, much of the task of fact-finding has been delegated to administrative tribunals without reservation to the courts of a right of judicial review. Independent regulatory commissions and the various administrative agencies have inherited broad areas of responsibility which include the performance of quasi-judicial functions. While the courts have yielded with great reluctance their position that all claims of legal right imply at

16. *Organization of Congress,* Hearings, Joint Committee on the Organization of Congress, 79th Cong., 2d. sess., p. 701.

some stage a right to a judicial hearing, there is a growing practice of settling innumerable legal questions in agencies which are much less restricted by rules of evidence and other procedural devices than are the courts.

While courts grudgingly recognized the legitimacy of a growing body of activities of administrative agencies, they showed the inclination to keep those activities within the area to which the judiciary would be confined in performing similar tasks. Only gradually have the courts come to recognize the broad serviceability of administrative agencies and the necessity of recognizing their right to range more widely than courts themselves would be able to do. The matter was discussed in a Supreme Court decision handed down in 1950 in which a corporation had challenged the activities of the Federal Trade Commission in checking on the corporation's obedience to a court decree in an earlier case. The corporation charged that the Commission was not merely investigating on the basis of evidence of guilt, but was engaging illegally in a mere "fishing expedition" to see if it could turn up evidence of guilt. The Supreme Court, speaking through Justice Jackson, admitted that a court itself would have no right to engage in such a "fishing expedition." Such activity by the Commission, however, was another matter. He admitted that judicial attitudes on the subject had changed, and traced the change as follows:

> We must not disguise the fact that sometimes, especially early in the history of the federal administrative tribunal, the courts were persuaded to engraft judicial limitations upon the administrative process. The courts could not go fishing, and so it followed neither could anyone else. Administrative investigations fell before the colorful and nostalgic slogan "no fishing expeditions." It must not be forgotten that the administrative process and its agencies are relative newcomers in the field of law and that it has taken and will continue to take experience and trial and error to fit this process into our system of judicature. More recent views have been more tolerant of it than those which underlie many older decisions. . . .
>
> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the grand jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.[17]

What we see in the delegation of rule-making power to administrative agencies and the allocation of quasi-judicial power to administrative agencies is the process of adapting the institutions of government to changing needs. In the reallocation of powers, the processes of rule making, interpre-

17. *United States* v. *Morton Salt Co.*, 70 S. Ct. 357, 363–64 (1950).

tation, and administration tend to merge. While our traditional belief in the separation of powers results in a certain amount of separation within administrative agencies, the necessities of particular factual situations tend to bring them together. Conservative lawyers and conservative business interests that dislike the variety and sometimes the informality of administrative processes try to turn independent regulatory commissions and other agencies having adjudicatory powers into tribunals as much like courts as possible, whereas administrators try to preserve for them the maximum of freedom and of power.

The Examiner. One of the major controversies in the administrative-judicial field has turned on an officer called the examiner. Examiners are employed by most government agencies having regulatory powers. They are used to collect the immense amount of evidence which each agency needs for making its rulings. An examiner may work in Washington or he may be sent to any part of the country to collect evidence, whether about the rates to be charged by railroads, business practices alleged to be unfair, or labor practices which violate federal statutes. Sitting virtually as a court, he hears sworn testimony from interested parties, makes up the agency record in the case, and writes a report recommending the action to be taken by his agency. By collecting evidence he becomes much better informed about the case than his superiors, in whose name he acts, are ever likely to be. They can overrule him if they so desire, but in the great mass of cases they will not do so. If a case is lost before the examiner it may well be lost permanently. Because of these facts, Congress has hedged the examiner about with regulations which tend to make his operations look like those of an administrative court. Nevertheless this quasi-judge remains a specialized officer in a specialized field. He is likely to know railroad problems, or labor problems, or finance problems and the law related thereto, but he will not know other fields and the law pertaining to them. He is expected to know the policies of his agency and to do his work in the light of them. In most agencies his superiors can at will look into his findings and substitute their judgment for his if they so desire. He is therefore a kind of hybrid, neither all judge nor all administrator. It is too early to tell whether he will eventually become one or the other, or whether he will carve out a kind of permanent status for himself somewhere between the two.

The Conflict Between Law and Administration. There is a nominal and at times an actual conflict between the pattern of law and the pattern of administration. Law is concerned with rules, principles, and precedents. It emphasizes conformity to legally established patterns. Where the question of rights is involved, it assumes that justice has been done when all legal forms have been observed. Justice and the public welfare are the end products of law, and according to the legal thinker it is only through law that they are to be attained.

From the point of view of administration, however, law plays a lesser part, and oftentimes even an obstructive part. To illustrate, Congress enacts a measure authorizing the Department of the Interior to clear swamps, erect dams, provide for irrigation, and otherwise to extend the total amount of land available for agricultural purposes. To insure that the power given by the statute will not be abused, it prescribes in various ways a mode of administering the statute. If in executing the statute the Department of the Interior gets involved in litigation, the court or courts concerned will deal with the exact determination of what the law is at the controversial point and with the way in which it is to be administered. The court, to repeat, is basically preoccupied with the law, with the statute, and seldom permits its concern to range much beyond the statute.

The administering department, however, if it follows the pattern of most administrative agencies, will be primarily concerned with achieving the ultimate purpose of the statute and not with adherence to it in detail. It will view most impatiently all litigation over the exact meaning of the statute. A statute, which is almost always restrictive as well as power-giving, is to an administrator often as much something to be gotten round as a rule to be strictly obeyed. Administrators like discretion much better than they like restraint. This implies an assumption on the part of the administrator not only that he can carry into effect an act of Congress better than Congress itself can — a fact which Congress would admit — but also that he could make better law on the subject than Congress could make. Part of the difficulty lies in the fact that no man of action likes to be restrained by rules laid down by other men. He is interested in achieving the prescribed results and knows, or thinks he knows, how to get them. Preoccupation with legal rules is for black-robed justices in darkened court chambers, but not for him. Preoccupation with law seems to him a retreat from reality and something largely irrelevant to the achievement of the purposes of government.

The conflict is real and it calls for serious attention as we seek to adapt our political institutions to meet current conditions, but it is not as fundamental as it is sometimes made to seem. The administrator, like the jurist, believes in law. The law in which he believes, however, is primarily not in the form of constitutions or statutes. It is the law of the moment which he himself makes to meet a given situation, law which he evolves out of his conception of the needs of that situation. Such a conception of law may be utilitarianism and pragmatism "run riot," and it may be saturated with abuse because of the infiltration of personal bias and personal or group interest, but it is nevertheless a concept of law. Like the legislative law advocated by Bentham in his clash with Blackstone, it is aimed toward getting immediate and rather specific results rather than toward conformity to some abstract verbal pattern which may seem to bear little relation to the pattern of reality. To the jurist, on the other hand, who is steeped in the wisdom of the past and who has not lost his judgment and poise in attempts to convert current chaos into a semblance of order, the

development and application of tried and tested principles of law have a reality and a relation to public welfare out of all proportion to the value of the unorganized expediencies of the administrator who is preoccupied with the events of the moment. In a sense, therefore, the conflict between Blackstone and Bentham continues to this day with patterns only slightly modified. The differences are differences of both philosophy and temperament. There is merit as well as bias in each approach. Both are needed. The people may well see to it that neither develops to the exclusion of the other.

References

Sir William Blackstone, *Commentaries on the Laws of England* (available in many editions).

Edmond N. Cahn, *The Sense of Injustice* (New York University Press, 1949).

Benjamin N. Cardozo, *The Growth of the Law* (Yale University Press, 6th ed. 1939).

———, *Paradoxes of Legal Science* (Columbia University Press, 1930).

Jerome Frank, *Courts on Trial* (University of Princeton Press, 1949).

Felix Frankfurter, *Some Reflections on the Reading of Statutes* (Association of the Bar of New York, 1947).

John Chipman Gray, *The Nature and Source of the Law* (Macmillan, 2d. ed., 1938).

Charles G. Haines, *The Revival of Natural Law Concepts* (Harvard University Press, 1930).

James W. Hurst, *The Growth of American Law: The Law Makers* (Little, Brown, 1950).

Robert H. Jackson, *The Struggle for Judicial Supremacy* (Knopf, 1941).

Law: A Century of Progress, 3 vols. (New York University Press, 1937).

Beryl H. Levy, *Our Constitution: Tool or Testament?* (Knopf, 1941).

George W. Paton, *A Testbook of Jurisprudence* (Oxford University Press, 1946).

Roscoe Pound, *Contemporary Juristic Theory* (Claremont Colleges, 1940).

———, *Interpretations of Legal History* (Macmillan, 1923).

———, *The Spirit of the Common Law* (Marshall Jones, reprint, 1931).

———, *Social Control Through Law* (Yale University Press, 1942).

Max Radin, *The Law and You* (New American Library, 1948).

Sidney P. Simpson and Julius Stone, *Cases and Readings on Law and Society*, 3 vols. (West Publishing Co., 1948–1949).

PART FIVE ★ *Finances and Financial Control*

22

The Sources of Federal Funds

Although in previous chapters the attempt has been made to isolate each of the three branches of the federal government for critical examination, we have also stressed the need for collaboration among them and the inevitability of a certain amount of overlapping. From this point onward the discussion will deal more broadly with the exercise of governing power as it relates to particular areas of activity, and the separate work of the three branches will be distinguished only incidentally. The three chapters in this section deal with intricate and interrelated problems of public and private finance, problems of the monetary lifeblood of the nation. They deal with the collection of funds to be expended by the federal government, the purposes and methods of expenditure, the effects of collection and expenditure upon the economy, the regulation of the currency, the regulation of banking, the control of credit or the attempts at such control, the effects of such activities upon tendencies toward inflation and deflation, and related matters. The various aspects of the subject are so interconnected that to discuss any one of them first involves an element of distortion or artificiality. Since it is impossible to talk about everything at once, we shall begin with the sources of federal funds. Those sources are taxation, borrowing, and the earnings and miscellaneous fees collected by various governmental agencies.

TAXATION

Definition. Most of the revenue collected by the federal government is derived ultimately from taxation. Article I, Section 8 of the Constitution provides that "Congress shall have power to lay and collect taxes, duties, imposts, and excises." The various Supreme Court definitions of taxes include the following:

> A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government.[1]

Only governments can collect taxes within the legitimate meaning of the word, and in order to be classified as taxation the collection of money must

1. *United States* v. *Butler,* 297 U.S. 1, 61 (1936).

be for a public purpose. Although the Constitution places certain limits on the methods of collecting taxes, it places no limit on the amounts collected. As long as the American people have economic resources at their command, the government may raise revenue from those resources. The unlimited power of government in this field becomes starkly apparent only in time of war. In peace time, traditions with respect to taxation and political resistance of the people may tend to keep taxes down. In time of war, on the other hand, when survival depends on victory, the right of government not only to regulate and use but also to appropriate to itself the needed resources of the people becomes clear.

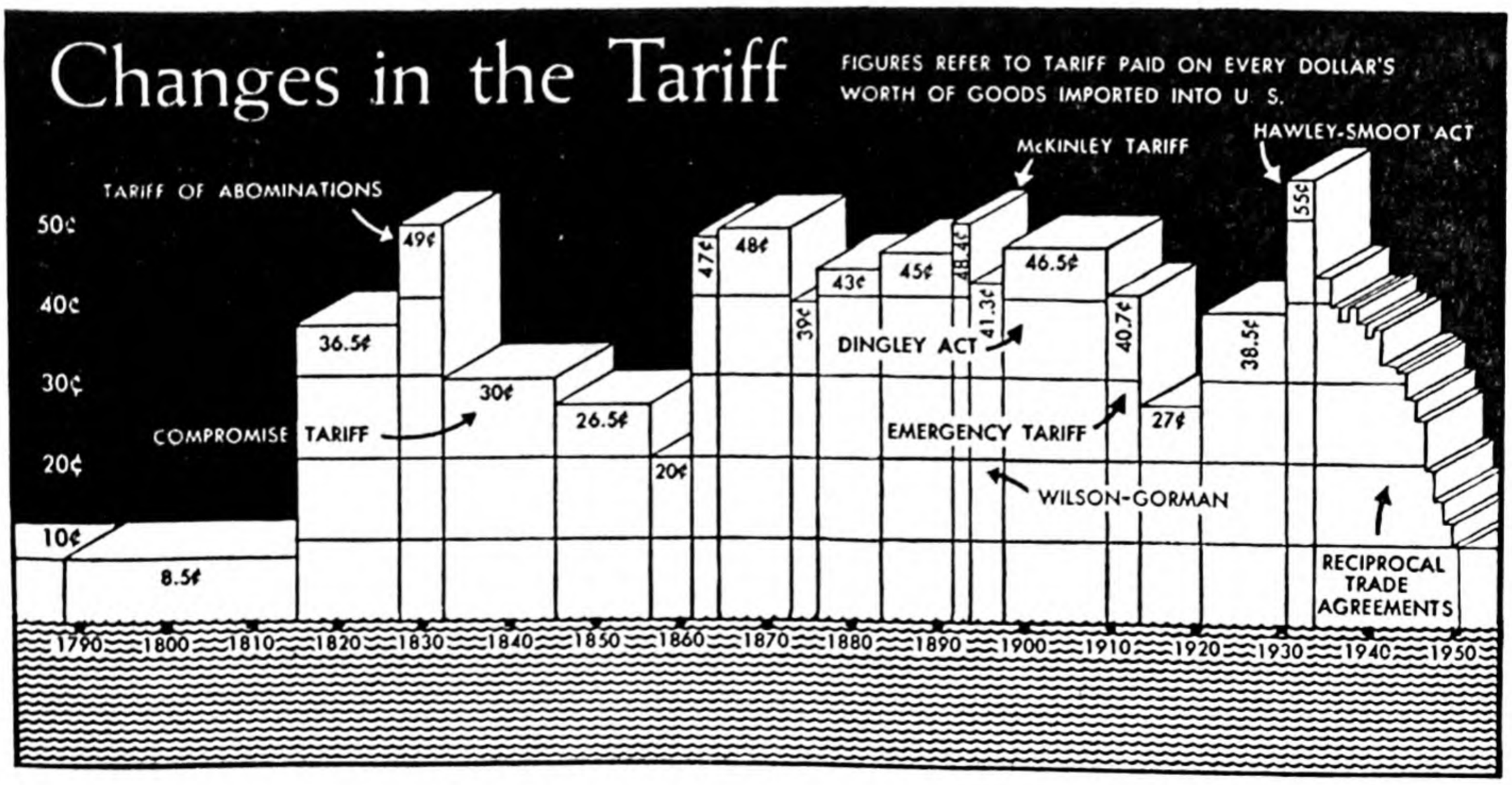
Apart from questions of method, the major problems of taxation are not problems of the constitutional scope of the taxing power but rather are political and economic. Tax policy, furthermore, involves questions not only of the amount to be collected but of the sources from which revenues are to come. Sources are chosen not only because of the political resistance of individuals and groups seeking to escape the burden of taxation but also because of the effects which the collection of various amounts from various sources may have on the social and economic order.

Taxation as a Means of Regulation. Taxation is a means of raising revenue and also a method of regulation. It cannot be otherwise. The collection of any considerable amount of money from any source must inevitably have an impact upon economic behavior in that sector. Society responds to the impact of every exaction whether it be a tax on real or personal property, income, importation, manufacture or sales, or on other forms of property or process. Every selection of taxable sources implies judgments on matters of public policy. A graduated tax on incomes, for example, whereby people with higher incomes and fewer dependents pay more, implies a belief that ability to pay should be an important consideration and that low income people with large families should be shielded economically by the more prosperous. A tax on inheritances implies a belief that society as well as the heirs of deceased people should benefit from their accumulations. A high tax on the manufacture of liquor and tobacco, when there is no comparable tax on the production of food, indicates the prevailing belief as to the relative social importance of the two kinds of commodities. Resort to a general sales tax with few exemptions implies a belief that all consumers should pay for the support of the government in proportion to the amounts which they consume. Exemption of food from sales taxes implies a belief that this fundamental item should go unburdened because of the needs of the people with low incomes. All tax measures, it should be repeated, involve such considerations of social and economic policy. The considerations may seem to be predominantly political in that for his own protection the politician seeks to make taxation as painless as possible, but painfulness in such matters is governed partly by popular beliefs as to how much taxes should be collected and from what sources. The quantity of tax money raised, as distinguished from the

sources, must be governed largely by prevailing conceptions of the total of functions which government is to perform.

Trends in Federal Taxation. One of the important reasons for the adoption of the federal Constitution was the need to equip the federal government with power to raise revenue directly instead of relying upon voluntary contributions from the states. For many decades, Congress relied upon customs duties — the collection of taxes on imports — as the primary source of federal income. There were various reasons for this. The American people were hard put to pay even the modest taxes which were levied by the states. Any considerable federal levies would have been deemed oppressive. With taxes on imports, however, many taxpayers assumed that that burden was carried not by them but by the foreign producers and shippers. American manufacturers demanded such duties in order to raise the price of foreign goods for consumers and thus to give American manufacturers an advantage in their own local markets. The first tariff statute, enacted by the first Congress, included as one of its justifications a reference to "the encouragement and protection of manufactures."

Apart from the period of the Civil War, the tariff remained for a century the most important source of federal revenue. It was supplemented by income from the sale of public lands and to an increasing extent by various types of excise taxes, which in themselves went far toward paying the expenses of the government. Tariff revenues fluctuated, of course, with the quantity of imports and with the rates fixed by tariff legislation. As American manufacturers increased their influence over governmental policy, tariff levels were increased in order to permit American producers to sell at high prices without suffering from foreign competition. The higher the tariff, the greater the protection. Income from customs duties did not necessarily



THE RISE AND FALL OF TARIFF RATES

increase with the lifting of tariff rates. If those rates were placed high enough to make them completely protective, that is, to discourage all competitive sale of foreign products, then there would be no importation and no revenue.

Decisions on tariff levels, as on tax levels everywhere, involve conflicting interests. If manufacturers benefit from high tariffs, consumers as a rule do not. Since early manufacturers were located largely in the North, the tariff issue raised a conflict of interest between the North and the South. The high tariff measure known as the Tariff of Abominations, which was enacted in 1828, led in 1832 and 1833 to the threat of nullification by the state of South Carolina. Had South Carolina succeeded in preventing the enforcement of a displeasing federal statute, other states would have followed suit, so that the maintenance of the Union would have been jeopardized. The federal government under the leadership of President Jackson prepared to meet nullification by force and at the same time enacted the compromise tariff measure of 1833, which provided for a gradual reduction of rates. Nevertheless the issue remained a political football to be kicked back and forth by the representatives of various interests.

Excise Taxes. The first administration, under the leadership of Alexander Hamilton as Secretary of the Treasury, sought to establish as early as possible the right of the federal government to collect excise taxes within the country as well as duties on imports. An excise tax on the manufacture of whiskey led to the so-called Whiskey Rebellion of 1794, but the rebellion was suppressed and the practice was established. Resort to excise taxes varied from period to period, first becoming extensive during the Civil War when these taxes, coupled with an income tax, yielded for a time more revenue than was provided by customs duties. Many of these taxes were dropped or greatly reduced after the Civil War, but by this time the government had learned their potentialities as sources of revenue. The increased costs of government led to increased reliance on excise taxes, so that by the 1890's they yielded roughly the same annual amounts as did the tariff. The principal sources of relatively permanent excise taxes were at that time liquor and tobacco.

The Income Tax. The income tax was first used during the Civil War. It was abandoned soon after the war ended, but during the ensuing years of depression and economic readjustment rural and debtor groups which objected to a high protective tariff argued for the reestablishment of an income tax as a way to collect from the more prosperous interests in the country their just share of federal taxes. Requirement of an income tax provided one of the important planks in the platform of the Populist party during the early 1890's. The Democratic party took over this plank for its own use, and, in a measure which reduced tariff levels, provided for a tax of two percent on all incomes above $4,000. This was the period when the so-called "robber barons" were ruthlessly acquiring their industrial and

commercial empires and propertied interests were frightened by the spread of radicalism. The advocates of the unlimited printing of paper money and unlimited coinage of silver and other panaceas for the ills of the unfortunate kept businessmen and their lawyers profoundly uneasy. Dreams of the horrors of socialism and communism disturbed the slumbers of the fearful.

Opponents of the income tax with its broad base of exemptions, unable to prevent congressional enactment of the measure, retreated to make another stand in the Supreme Court. There they challenged the constitutionality of the tax. One of their distinguished counsel, Joseph H. Choate, attempted to show the inequitable operation of the tax by predicting that nine-tenths of it would be collected in the four states of New York, Pennsylvania, Massachusetts, and New Jersey, the states in which most high incomes were earned. He characterized the movement as a "communist march" and as an attack on one of the fundamental objects of all civilized governments, the preservation of the right of private property.

Direct and Indirect Taxes. The leading question of the several constitutional questions involved in the income tax case, which was decided in 1895, turned on a matter of procedure prescribed in the Constitution, a distinction between direct and indirect taxes. The Constitution provided merely that duties, imposts, and excises, which were classified as *indirect taxes*, should be uniform throughout the United States; that is, the same object or process should be taxed equally wherever in the United States it might be found. The Constitution provided that *direct taxes*, however, should be apportioned throughout the several states in accordance with population. That is, if Congress attempted to raise revenue by a direct tax, the amount to be collected in each state was to be measured by the ratio of the population of that state to the total population of the nation, and not merely by the amount of property in the state to which the tax was applied. The framers of the Constitution had adopted this device to give protection against a Congress which might seek to levy heavy taxes on kinds of property — slaves, for example — which were found only in particular sections of the country. The requirement that each state share in the payment on the basis of its population would prevent discrimination against property in slaves or in any other category.

Although the distinction between direct and indirect taxes was one much used by economists, it was by no means clear. In an early decision,[2] the Supreme Court had leaned toward an interpretation that the only direct taxes were those which were collected on land, and poll taxes, or capitation taxes. Shortly after the close of the Civil War, the income tax of that period was challenged as a direct tax which had not been properly apportioned, but the Supreme Court, leaning on the early decision mentioned, held that the income tax was not a direct tax.[3] After the enactment of the 1894 income tax measure, however, some of the ablest lawyers in the country went

2. *Hylton* v. *United States,* 3 Dallas 171 (1796).
3. *Springer* v. *United States,* 102 U.S. 586 (1881).

to work to prove that income taxes, or at any rate taxes on income from land, should be treated as if they were taxes upon the property itself and therefore as direct taxes. If they were direct taxes, then they could be collected only if apportioned among the several states according to population. Such an apportionment would have prevented the collection of anything like nine-tenths of the then current tax from the four states with the highest personal incomes and would have required that the poorer states share in the payment of that revenue according to population, whatever the levels of incomes of their citizens.

The Income Tax Decision of 1895. The Supreme Court, which had been influenced not only by the brilliant reasoning of counsel but also by forebodings of a radical catastrophe, decided five to four that to be constitutional a tax on income from real estate was to be regarded as if it were a tax upon the land itself, and therefore as a direct tax which had to be apportioned among the several states according to population.[4] The decision was hailed by conservative interests and denounced by liberal and debtor groups, who felt that wealth ought to be made to pay its way. Although the distinction between a direct and an indirect tax was a highly technical matter which few people professed to understand, those who were dissatisfied with the decision were convinced that a bare majority of the Supreme Court had manipulated a constitutional technicality in such a way as to get the result which they desired. The decision, coupled with others of a similar trend in the same period, resulted in a great deal of criticism of the Supreme Court. It was followed soon afterward by the beginnings of a movement to secure a constitutional amendment which would authorize the levying of a graduated income tax without the necessity of apportionment among the states according to population.

Recent Trends. The war with Spain in 1898 and the expansion of governmental activities in the early 1900's required more revenue than could be provided by customs duties and the existing excise taxes. In the War Revenue Act of 1898, Congress provided for a graduated tax on legacies and inheritances. Again conservative interests challenged the provision as an unconstitutional attempt to collect direct taxes without apportionment, but the Supreme Court upheld the measure, calling it an indirect rather than a direct tax. Encouraged by this decision, Congress in 1909 levied on private corporations "a special excise tax with respect to the carrying on or doing business by such corporations." An excise tax is an indirect tax. Yet this one was to be measured by the net earnings of each corporation during the preceding year; and a tax measured by income looked very much like an income tax of the kind which the Supreme Court had held to be a direct tax and therefore subject to the apportionment provision of the Constitu-

4. *Pollock* v. *Farmers Loan and Trust Co.*, 157 U.S. 429, 158 U.S. 601 (1895). For discussion, see Carl B. Swisher, *American Constitutional Development* (Boston: Houghton Mifflin, 1943), Chapter 20.

tion. The Supreme Court accepted this classification as an excise tax and an indirect tax, however, so that the tax could be constitutionally collected without apportionment. So it was that for corporations the United States had what was virtually an income tax before the Sixteenth Amendment, adopted in 1913, authorized the collection of income taxes "from whatever source derived" without the necessity of apportionment.

After 1913 the graduated tax, levied on the incomes of individuals and corporations, quickly became the major source of federal income. This does not mean that the total amounts of revenue collected from other sources declined. The yield from customs duties reached its peak of something more than half a billion dollars during the 1920's. Even after substantial decline in the 1930's and 1940's, it still remained far above the total amount that would have been required to run the federal government during most of the years of the nineteenth century. Other sources of revenue also increased rather than declined, and various new sources were tapped. The primary difference between the old situation and the new was the enormous increase in the total functions of the federal government and hence in the total of revenue required. A government which seeks to promote the welfare of its citizens in a mass production economy, which wages major wars, and otherwise participates as a leading world power, cannot operate on a budget which bears any resemblance to that of the earlier *laissez faire* government which attempted, in large part successfully, to avoid foreign involvements.

MERITS OF DIFFERENT KINDS OF TAXES

Customs Duties. The best method of taxation is that which can be so adjusted as to raise the right amount of revenue at the right time, disturbs the economy least, arouses the least resentment and resistance in taxpayers, and in its inevitable effects on the economy molds it in the directions in which the people wish to have it molded. Customs duties lack the desired flexibility as a source for any large proportion of our present total national revenue. True, the amount yielded can be somewhat increased or diminished by raising or lowering tariff levels. Any substantial increase, however, is likely to curtail the foreign trade on which the duties are levied and therefore to reduce rather than increase the total yield. Furthermore, it is widely recognized that apart from the curtailment of revenues high tariffs may injure the nation by preventing a proper balance between imports and exports. In any event, the question of the importance of foreign trade is likely to be the controlling consideration, rather than the effect of particular tariff measures on the total national revenue. The annual yield of somewhat less than half a billion dollars is of course not to be taken lightly, but when annual budgets run to approximately forty billion dollars, this small figure is not likely to receive much consideration.

The Income Tax. The income tax, as stated above, has become the prin-

cipal source of federal revenue. It is assessed on the incomes of individuals and corporations. The tax started at a low rate after the adoption of the Sixteenth Amendment in 1913, and with high individual exemptions. The rate was greatly expanded to pay much of the cost of World War I. Rates in the higher brackets were lowered during the 1920's as the national debt was rapidly reduced. During the period of World War II, exemptions were lowered and rates in the higher brackets were increased to a point at which the federal government took as surtax ninety-one percent of all net individual income over $200,000. The surtax on incomes over $10,000 was thirty-eight percent, and on incomes over $2,000 was twenty-two percent.[5] The peak year for individual income tax collections was 1948, when the total ran to more than $20,997,000,000. The peak year for corporation income and excess profits taxes was 1945, with a total of more than $16,027,000,000. The peak year for total income and excess profits taxes was also 1945, with a figure of more than $35,061,000,000.[6]

Part of the advantage of the income tax on individual incomes as a source of revenue is that it can be collected with a minimum of disturbance to the taxpayer and to the economy. Since the enactment of the higher rates of the period of World War II, employers have been required to withhold and pay directly to the government a high percentage of the estimated taxes of employees. To the extent of this withholding, the wage earner must become reconciled in the beginning to the fact that this portion of his annual earnings will never actually be his. He gives up what he has never possessed.[7] Even when the tax is withheld, it bears upon income, upon something which has recently been added. It differs, therefore, from a tax levied directly upon property, which in times past has provided much of the revenue of the several states. A property tax may have to be paid out of the value of the property itself. It has to be paid whether or not the property has yielded anything of value. The collection of a tax on property may require the sale of the property for the payment of the tax. The income tax, by contrast, is collected only when income has been earned. In the absence of income, there is no tax. There is no tax even until a certain exempted amount, $600 each for the taxpayer and his dependents, has been earned to provide for bare subsistence. Within the area of income taxation, the rates can easily be adjusted upward or downward to provide for a higher or a lower yield. Upward steps are well illustrated by the increases in the yield of individual income taxes from 1941 to 1944. The several totals, in round figures, were: 1941, $1,400,000,000; 1942, $3,200,000,000; 1943, $6,600,000,000; 1944, $18,200,000,000.[8] The rate of increase was enormous,

5. The Revenue Act of 1948 left the same tax tables in effect but made percentage reductions in totals collected in normal taxes and surtaxes. Up to $400 the reduction in the tax was 17 percent. From $400 to $100,000 the reduction was $68 plus 12 percent of all over $400. Above that amount the reduction was $12,020 plus 9.75 percent of all over $100,000. See 62 Stat. 111. The Revenue Act of 1950, enacted during the period of the war in Korea, again increased the rates.

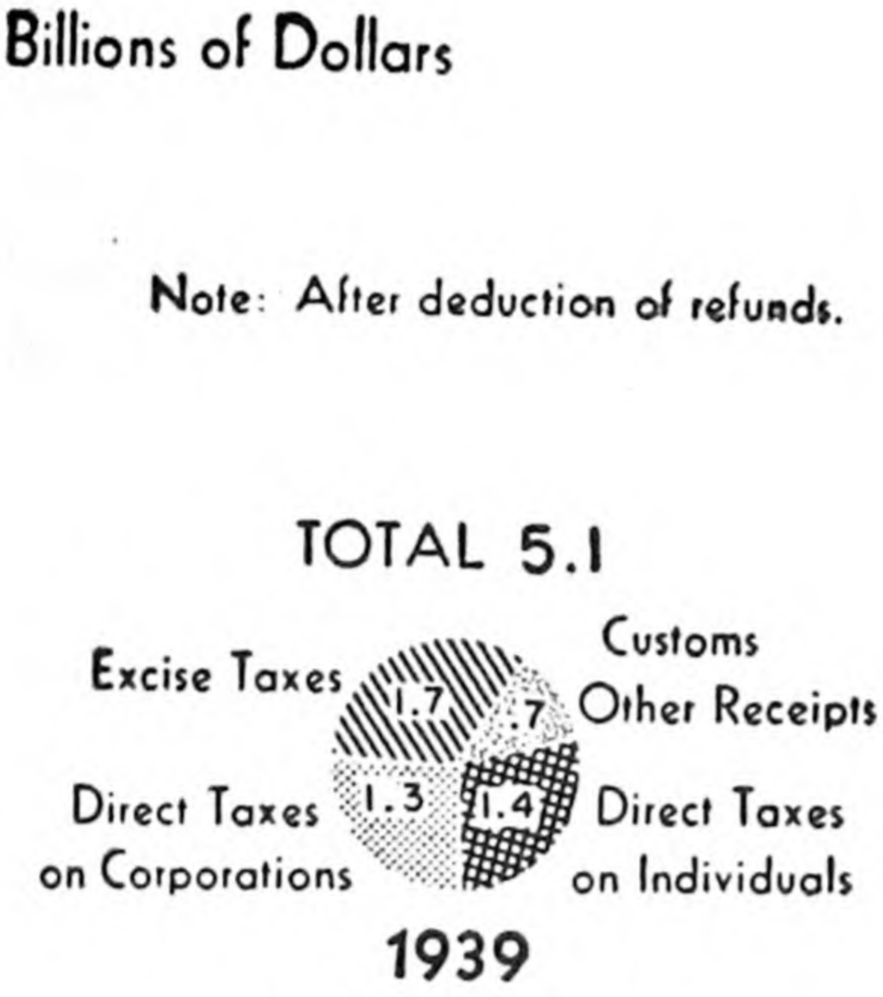
6. *Annual Report of the Secretary of the Treasury,* 1949, p. 389.

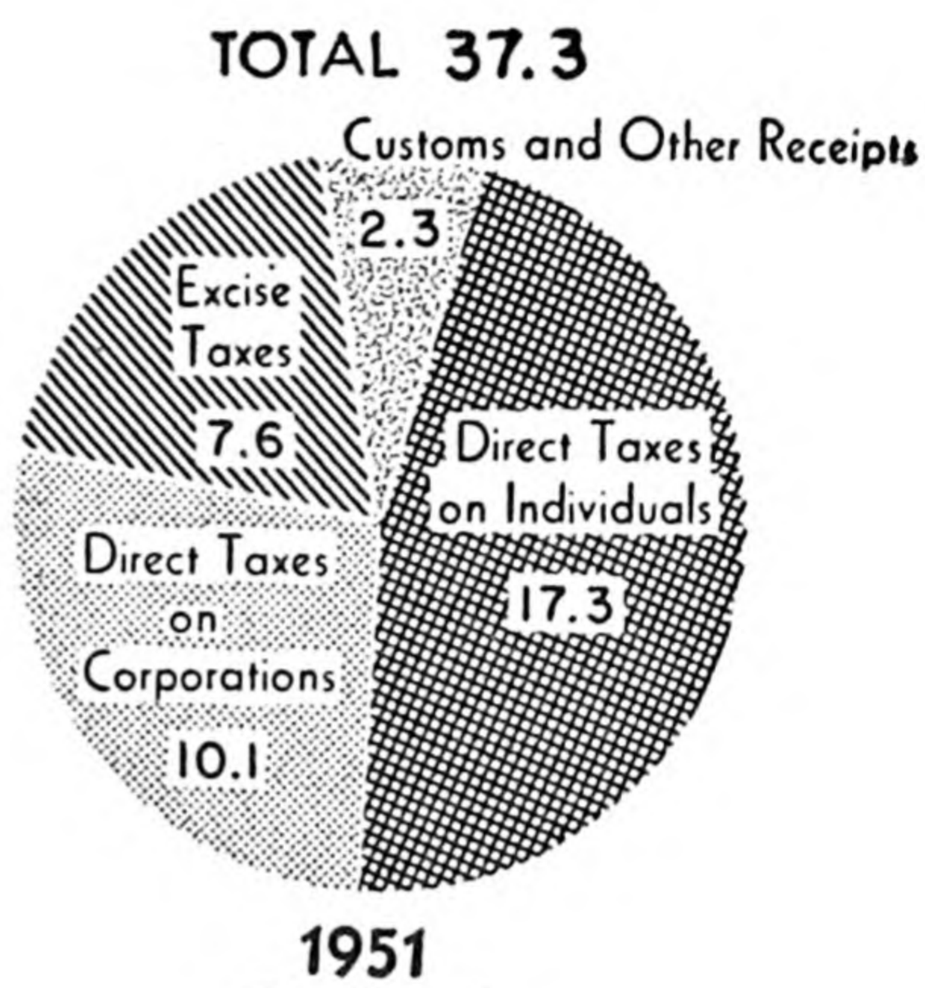
7. For 1949 more than $10,000,000 was withheld out of a total of more than $18,000,000 in individual income taxes. *Ibid.,* p. 389.

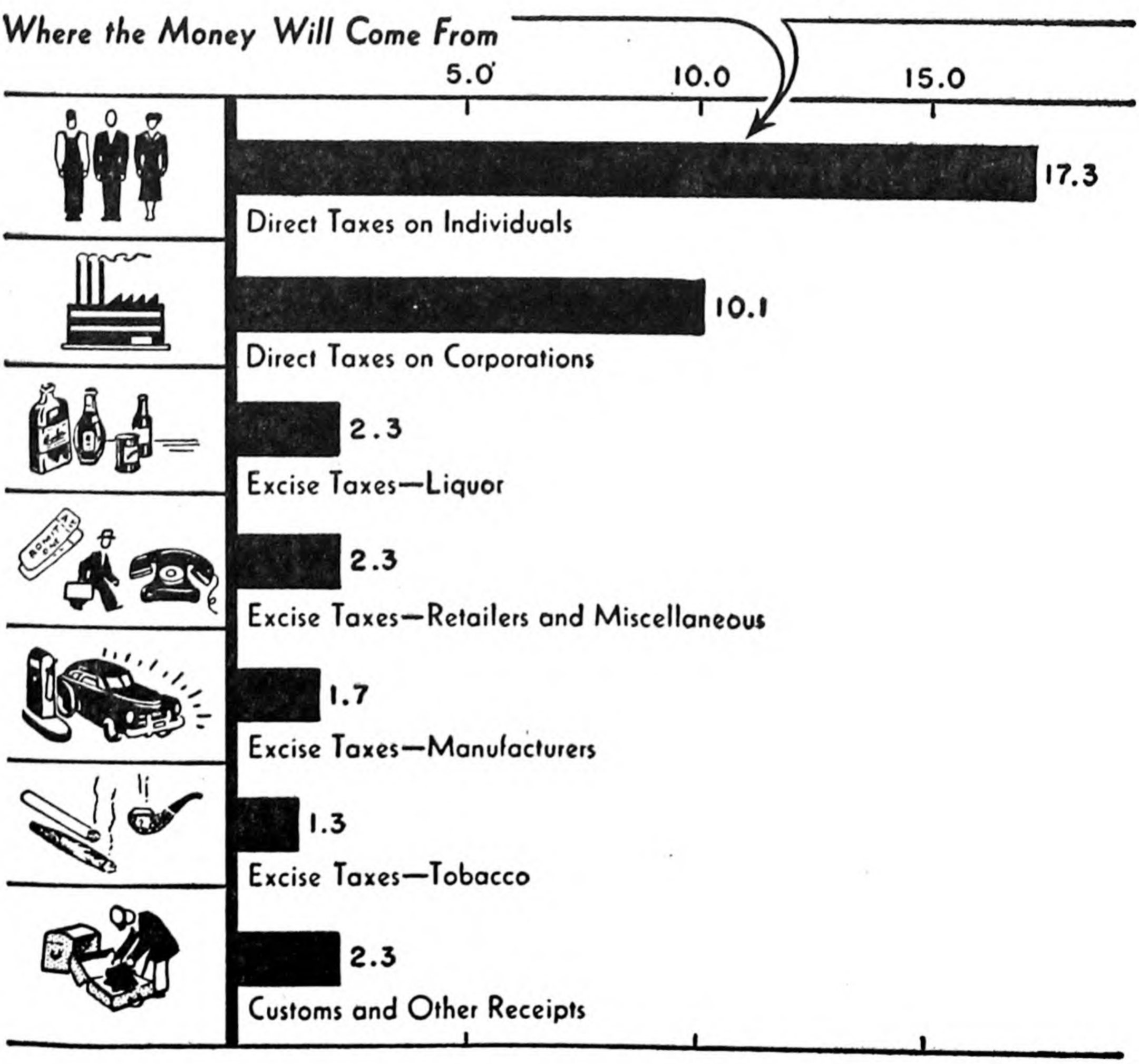
8. *Ibid.,* p. 389.

Billions of Dollars

Note: After deduction of refunds.







BUDGET RECEIPTS: WHERE THE MONEY WILL COME FROM

but even so, the amount collected came out of net income and not out of capital.

Graduation of Income Taxes. The graduation of income taxes is also an important feature. Graduation in any particular tax measure reflects, by and large, current sentiments as to the way the tax burden ought to be allocated among people at different income levels. On such matters, there is never full agreement. People with high incomes almost always feel that the higher rates they have to pay reflect unjust discrimination. They lament their impoverished state and denounce their alleged oppressors. People with lower incomes cringe before the heavy hand of government as exemption levels are lowered and rates are increased. They feel that wealth ought to be made to pay its way and are inclined to suspect that it never does. People in the middle brackets believe that taxes bear with special heaviness upon them. So it is that almost nobody is ever satisfied with a particular tax bill. Yet any tax measure, as has been said, tends to reflect compromises which are most nearly reasonable in terms of prevailing general sentiments. With an eye to the welfare of the poor, the federal government has thus far resisted the enactment of a federal sales tax which would cut into incomes from all sources. On the other hand, it has never confiscated all income over certain amounts. During World War II, President Roosevelt raised the question whether any man in a time of major national crisis should be permitted to retain for himself an income of more than $25,000, but no such restriction was incorporated into law.

Income Taxes and Economic Control. During World War II the income tax, along with other federal taxes, was an effective part of the scheme of necessary economic controls. The Secretary of the Treasury phrased the matter thus:

> Taxes served as a primary curb on war profiteering and as a strong buttress to the anti-inflation program. High tax rates were also an important influence in gaining acceptance of, and making effective, such direct controls as wage and price ceilings. Without sacrificing standards of equity and fairness, taxes thus proved to be a powerful and flexible economic instrument in achieving a maximum war effort.[9]

At the end of a critical period, it becomes harder to maintain any system of controls, including those represented by taxes. So it was that, after the close of World War II, income tax levels were beaten downward along with the relaxation of other control mechanisms. Public opinion polls and the comments of politicians reflected in 1947 and 1948 a widely prevailing sentiment that an income tax should never take more than fifty percent of any legitimate income. Although not all income taxes were reduced to that level, Congress in 1948 so reduced rates that the treasury began to run a deficit and the process of reducing the national debt was reversed.

Excess Profits Taxes. Closely related to the subject of high taxes on high

9. *Annual Report of the Secretary of the Treasury,* 1945, p. 2.

incomes is that of excess profits taxes which are levied upon the higher profits of corporations. The term "excess profits" itself implies a social judgment on the right of corporations to accumulate income. Such taxes are, of course, denounced by the officers of big corporations as destroyers of business incentive and barriers to the achievement of a healthy economy. The argument becomes part of the general plea of the wealthy for lowering taxes on high income so that the savings of the people involved may be used to increase production. The excess profit tax of World War II, with its rate of ninety-five percent, was one of the devices used to make it appear that stability in the economy was being maintained and that no group was being permitted to gain peculiar advantages while others were being held in line. The restriction on corporate earnings which was maintained by the collection of such a tax no doubt limited incentive to economy within big and prosperous establishments, since numerous and far from essential expenses were deductible. For example, many corporations continued to spend enormous sums advertising their peacetime products, even though those products were not at the time available for purchase. Such advertising might help to maintain public good will for the peacetime future. If the money was not spent on advertising or on some other business project, it would go to the government, and therefore it might as well be spent! Here again, of course, the overlapping with high taxes on high individual incomes is apparent. Much has been said about the lack of incentive to earn high personal incomes if upwards of ninety percent of the total were to be taken by the government.

Business pressure and administrative dissatisfaction resulted in repeal of the excess profits tax by the Revenue Act of 1945. President Truman thereafter tried without avail to secure its reenactment. He succeeded for a time in maintaining other income tax levels, but in 1948 a Republican Congress forced him to accept a general reduction. It took the pressure of war in Korea and the threat of total war with the Soviet Union to reverse the downward trend in tax levels by means of the Revenue Act of 1950.

Miscellaneous Internal Revenue. In addition to income and excess profits taxes, other taxes, classified usually as miscellaneous internal revenue, yield impressive totals. Taxes on the passage of estates at time of death yielded for the fiscal year 1949 more than $735 million. While such a yield is entitled to respect, the source is not one upon which the government could rely for any large proportion of its revenues. The base amount is relatively limited, and even a tax which reached the point of confiscation would have only limited adequacy. Like customs duties, this source is to be relied upon for its limited yield but is not to be looked to as a substitute for other sources. Gift taxes yielded for the same year more than $60 million.[10]

The federal liquor tax for the fiscal year 1949 yielded more than $2,290,000,000.[11] During earlier years, the amount of revenue from this source had gone up with increases both in rates and in quantity of consump-

10. *Annual Report of the Secretary of the Treasury,* 1949, p. 389.
11. *Ibid.*, p. 595.

tion. Liquor is regarded by most people as a luxury rather than a necessity and, by a large segment of the population, it is classified as an outright evil. There is no general popular resistance to the collection of high taxes. Since large numbers of people are determined to drink whatever the cost, the practical limit of liquor taxation is probably reached at the undefined point where illegitimate sales without the payment of taxes cut in on legitimate sales. One reason for the richness of this source of revenue may well be that high taxes on liquor have been regarded as completely justifiable. One of the reasons given for the repeal of the prohibition act and of the Eighteenth Amendment to the Constitution on which it was based was the claim that the tax on the sale of liquor would aid in balancing the federal budget. Because of the evils of excessive drinking by a minority of the population, there is disagreement as to the legitimacy of permitting the evils in order to collect the revenue.

The tobacco tax for the fiscal year 1949 yielded more than $1,321,000,000. Much can be said of this impost that has already been said about the liquor tax. Tobacco is classified as a luxury even though to many people it has become virtually a necessity. It has long been an accepted source of federal revenue. Consumption during recent years has been increasing. Consumption is sure to continue in spite of the rate of taxation. Neither liquor nor tobacco nor the two together will ever pay nearly all the expenses of the federal government, but their contributions are substantial.

The federal government collects stamp taxes on issues of securities, on bond and stock transfers, on playing cards, and on silver bullion sales. The yield for the fiscal year 1949 was more than $72,828,000. Although the amount involved would not pay the expenses of the government for one whole day, this, along with other small amounts, has its value.

Manufacturers' excise tax collections for the fiscal year 1949 amounted to more than $1,761,000,000.[12] These taxes are levied on the manufacture of automobiles and related equipment, gasoline, lubricating oils, electrical energy, and so on. In large part, this tax represents levies on areas of manufacture which have loomed large only in recent decades. Such taxes have nct been extended to manufacture generally.

Retailers' excise taxes for the fiscal year 1949 yielded more than $499 million.[13] They involved collections on such luxury items as jewelry, furs, toilet preparations, and luggage. Here again conceptions of social value are involved. It is assumed that if worse comes to worst, people can get along without the items on which this tax is levied. To be able to purchase these items implies a certain amount of economic resiliency and hence the ability to pay taxes which other people might not be able to pay.

Along with the various taxes listed above, are classified miscellaneous excise taxes too numerous for separate listing. They include collections from telephone, telegraph, radio, and cable facilities, admission taxes on amusements, taxes on transportation of persons and property, and, oddly enough

12. *Ibid.*, p. 596.

13. *Ibid.*, p. 596.

in this category, a sugar tax. In total these taxes for the fiscal year 1949 reached the impressive amount of more than $1,758,000,000.[14]

Employment Taxes. Classified separately from the internal revenue taxes are employment taxes and railroad unemployment insurance contributions. These are taxes which are collected and set aside for specific purposes in connection with the operation of the social security program, which will be discussed at greater length in another chapter. The amount collected varies with total employment and also in terms of the rate of the tax fixed by Congress. The total of employment taxes for the fiscal year 1949 was more than $2,476,000,000.[15]

ENACTMENT OF TAX LEGISLATION

Congressional Machinery. The Constitution provides that all bills for the raising of revenue must be initiated in the House of Representatives. Such bills are handled by the Committee on Ways and Means. That committee holds hearings on all tax bills which have any prospect of enactment. Among the witnesses are sure to be representatives of groups of taxpayers who would be affected by provisions of the proposed bill. Among the witnesses also are likely to be representatives of the Treasury Department who express the views of the department and perhaps of the President as to amounts and sources of federal revenue. Although the Treasury Department can provide a great deal of information about the collection of revenue, which is its major function, it has no power to dictate the tax program. The President has over the tax program the same power he has over other legislative activities, including the power of veto, but he cannot compel Congress to enact statutes and he must bow to the will of the two-thirds majorities of the two houses which may override his veto.

Tax measures initiated in the House of Representatives go through Congress in the same manner as other measures. In the Senate they are referred to the Committee on Finance, which usually includes a number of senators of high prestige and which oftentimes recommends and secures adoption of extensive modifications of tax bills as they have come from the House of Representatives.

Tariff Legislation. The hot legislative battles which are sometimes fought over ordinary tax measures are seldom comparable to the struggles involved in the enactment of tariff measures. Because the tariff is definitely regulatory as well as a means of raising revenue, and because various local interests are intimately affected by it, members of Congress are driven into bitter and prolonged conflict not only over tariff levels as a whole but also over the rates applicable to particular imported items. By and large, in view of the character of the pressures involved, it seems somewhat easier to raise the tariff than to lower it, but intelligent action in either direction

14. *Ibid.*, p. 596.

15. *Ibid.*, p. 596.

has proved well nigh impossible for an elective body so constituted as Congress.

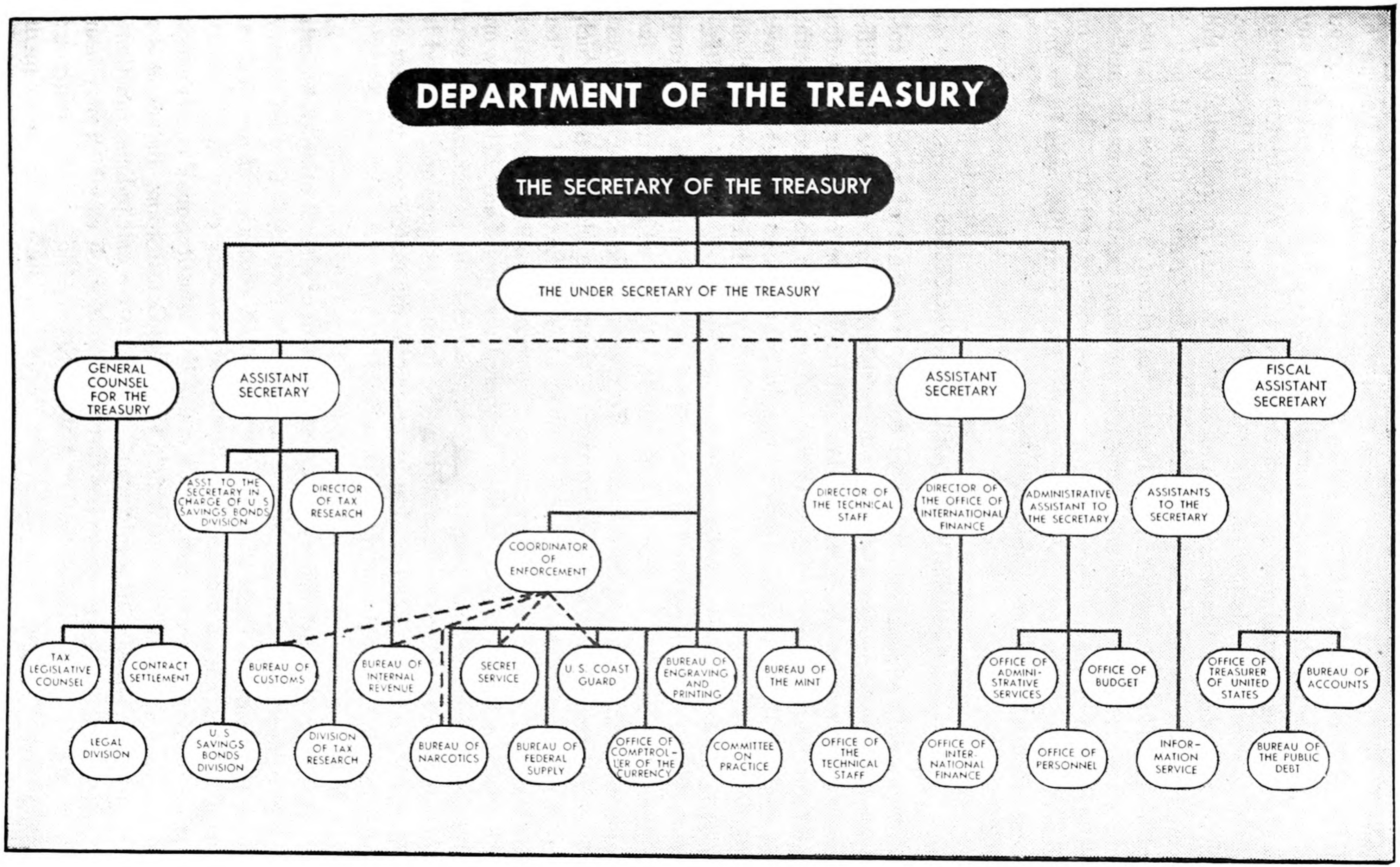
The Tariff Commission. Congress therefore gradually made arrangements for shifting part of the responsibility to the executive branch of the government. In 1916 a United States Tariff Commission was established, composed of members of the two leading parties, having responsibility for research, and reporting to Congress on economic matters bearing upon tariff policy. In 1922 Congress extended the responsibility of the commission by directing it to investigate the changing circumstances of foreign trade and to make recommendations to the President for the raising or lowering of established rates up to fifty percent in order to maintain a current balance of trade in terms of far from clearly defined standards.

Reciprocal Trade Agreements. This flexible tariff arrangement proved inadequate to meet the program of the Democratic party when it came into power in 1933. In 1934, Congress enacted a reciprocal trade agreements act which gave to the executive branch of the government extensive power for bargaining with other countries over tariff rates in an attempt to secure reciprocal and mutually beneficial reduction of tariff schedules. This program, which Congress has extended from time to time, has brought about substantial reductions in tariff schedules with many different countries on large numbers of products. The effect upon federal revenue has been relatively slight. The importance of the program has been largely in connection with the issues of foreign relations and foreign trade, which will be discussed elsewhere.

THE COLLECTION OF TAXES

The Treasury Department. Although taxes are levied by Congress, they are collected by the Treasury Department. This department is headed by the Secretary of the Treasury, who is second in rank in the President's cabinet, being subordinate only to the Secretary of State. The principal arms for the collection of taxes are the Bureau of Customs and the Bureau of Internal Revenue. When customs constituted the principal source of federal revenue, the Bureau of Customs had the major task. It continues its original functions, but it is now dwarfed by the Bureau of Internal Revenue. The Bureau of Customs maintains ports of entry at all borders of the United States and at airports where planes arrive from foreign countries. It enters and clears vessels, supervises the discharge of cargo, appraises and classifies merchandise, and assesses and collects duties thereon. It patrols international borders and inspects international traffic by all modes of transportation to prevent smuggling and see that duties are paid. The United States Coast Guard polices the coast to prevent smuggling and insure the collection of customs.

DEPARTMENT OF THE TREASURY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THE UNDER SECRETARY OF THE TREASURY
GENERAL COUNSEL FOR THE TREASURY
ASSISTANT SECRETARY
ASSISTANT SECRETARY
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DIRECTOR OF THE OFFICE OF INTERNATIONAL FINANCE
ADMINISTRATIVE ASSISTANT TO THE SECRETARY
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CONTRACT SETTLEMENT
BUREAU OF CUSTOMS
BUREAU OF INTERNAL REVENUE
SECRET SERVICE
U.S. COAST GUARD
BUREAU OF ENGRAVING AND PRINTING
BUREAU OF THE MINT
OFFICE OF ADMINISTRATIVE SERVICES
OFFICE OF BUDGET
OFFICE OF TREASURER OF UNITED STATES
BUREAU OF ACCOUNTS
LEGAL DIVISION
U.S. SAVINGS BONDS DIVISION
DIVISION OF TAX RESEARCH
BUREAU OF NARCOTICS
BUREAU OF FEDERAL SUPPLY
OFFICE OF COMPTROLLER OF THE CURRENCY
COMMITTEE ON PRACTICE
OFFICE OF THE TECHNICAL STAFF
OFFICE OF INTERNATIONAL FINANCE
OFFICE OF PERSONNEL
INFORMATION SERVICE
BUREAU OF THE PUBLIC DEBT

The Bureau of Internal Revenue. Whereas for the fiscal year 1949 the Bureau of Customs collected more than $518 million,[16] the Bureau of Internal Revenue collected more than $42,773,000,000.[17] The latter bureau is responsible for the assessment and collection of all taxes imposed by any law providing internal revenue. It occupies centrally in Washington a huge building erected for its use and maintains offices and personnel throughout the United States. It works out rules and regulations for collection of the various taxes provided for by the several statutes. Among other things, it provides and distributes forms for income tax returns, it receives payments, checks the returns, coerces the payment of taxes not paid voluntarily, makes refunds, and in general coordinates a vast network of activity. The cost of collecting the more than $40 billion for the fiscal year 1949 was forty-four cents for each hundred dollars collected.[18]

ADMINISTRATIVE–JUDICIAL PROCESSES

Customs Controversies. While an enormous amount of revenue is collected by methods which are almost exclusively administrative, the difficulties involved in the interpretation and application of revenue statutes and the diverse economic interests involved bring also an enormous amount of conflict. In the collection of customs duties, the controversies arise over the classification of imports and over the value which is attached to them and in terms of which the import duties are measured. Tariff rates differ with different products, and the classification of an article in one group rather than another may have a great deal to do with determining the amount of the duties to be collected. To give a single example, a business firm had imported a saw. There were at least two classifications which might be applied to it. The first applied to "manufactures of metal," on which the duty was forty-five percent. The second applied to circular saws "finished or further advanced than tempered and polished." The duty on this kind of article was twenty percent. Because this particular saw was unfinished, the collector classified it in the former category and assessed it at the higher rate. The question for review in the matter was whether or not the article had been properly classified.[19]

The Customs Court. To decide questions both of classification of imports and of their value, the government maintains in New York City an agency now known as the United States Customs Court, consisting of nine judges. The court is not attached to the Bureau of Customs or to the Treasury Department in any way, yet it is not one of the "constitutional" courts which have been set up pursuant to Article III of the Constitution. Rather, it is a "legislative" court, with a mixture of administrative and judicial functions. To speed its work, the court has three divisions, each of which may hear and decide cases independently. Not all the decisions of the court are published, but only those which are deemed of such value as to merit

16. *Ibid.*, p. 550. 17. *Ibid.*, p. 363. 18. *Ibid.*, p. 159.
19. *B. A. McKenzie and Co., Inc.* v. *United States*, 42 U.S. Customs Ct. 147 (1946).

circulation. The published decisions appear in a series entitled *United States Customs Court Reports.*

The Customs Court had its origin in a board of appraisers, the members of which were officers of the Treasury Department. Something of the political character of its origin is indicated by the fact that no more than five judges of the court can be appointed from the same political party. Cases are decided by divisions of the court and even, at times, by an individual judge. Moreover, a judge or a division may be sent to any port in the United States to hear a case. These facts further indicate the hybrid character of an agency which is perhaps in transition from administration to adjudication.

The Court of Customs and Patent Appeals. Perhaps in part because of this hybrid character of the Customs Court and in part also because of the exceedingly technical character of the work to be done, Congress has provided a special appellate court above the Customs Court. That tribunal, sitting in Washington and consisting of a presiding judge and four associate judges, has also been classified by the Supreme Court as a legislative rather than a constitutional court.[20] Because it has jurisdiction in patent matters as well as customs cases, it is called the United States Court of Customs and Patent Appeals. It too has its own series of reported decisions which include independent volumes on customs and patents. The court is at the level of the United States circuit courts of appeals, and its decisions appear in *The Federal Reporter* along with the decisions of those courts. Most of the customs cases which go beyond the Customs Court have their final destination in the Court of Customs and Patent Appeals. An occasional case of general importance is accepted and decided by the Supreme Court.

Internal Revenue Controversies. The scope of internal revenue legislation is far greater than the scope of customs legislation. The subject matter is more varied, the traditions of taxation are less well established, and legislative changes are much more frequent. Hence far more controversies arise, and even more administrative rule-making is required in this field than in the collection of customs. Initial rules are made and decisions arrived at in the name of the Commissioner of Internal Revenue. Here as in the field of customs, however, the right of appeal must be provided. The appellate tribunal is called the Tax Court of the United States, an agency consisting of sixteen members. The tax court was originally established as the Board of Tax Appeals and characterized as "an independent agency in the executive branch of the government." The Supreme Court, however, held that in actuality it was not a court at all.

> It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the board has been had and decided.[21]

20. See *Ex Parte Bakelite Corporation,* 279 U.S. 438 (1929).
21. *Old Colony Trust Co.* v. *Commissioner of Internal Revenue,* 279 U. S. 716, 725 (1929).

In changing the name to Tax Court of the United States, the Committee on Ways and Means of the House of Representatives emphasized the fact that no change was made in its status. The board would be continued as an independent agency in the executive branch of the government, and its status as an executive or administrative board would be unchanged. "This amendment does not change the functions of the board, the present method of handling cases, or the eligibility of laymen for service on the board." [22]

The sixteen members of the Tax Court, which has its headquarters in Washington, may be designated to sit individually or in divisions and to perform their work at any point in the United States where an internal revenue controversy arises. Its decisions are published in a series entitled *Reports of the Tax Court of the United States.*

Although the Tax Court does a heavy business, there is for internal revenue no appellate court corresponding to the United States Court of Customs and Patent Appeals. Rather, appeals go directly from the Tax Court to the United States circuit court of appeals of the District of Columbia or of the circuit in which the Tax Court decision was handed down. Such cases reach the circuit courts of appeals in considerable numbers. Because of the novelty and general importance of many of the questions involved, furthermore, a considerable number of these cases go on to the Supreme Court. Whereas in many fields of governmental activity most of the important issues are eventually clarified so that there is little litigation at top levels, the relative frequency of changes in tax legislation, coupled with the tireless efforts of taxpayers to avoid payment, keeps the stream of litigation at a high level.

Efficiency in the Collection of Revenue. By and large, in spite of the rough estimate of more than a billion dollars in tax evasions each year,[23] the federal government is highly effective in collecting taxes. Although under certain circumstances a court may enjoin — forbid — the original collection of taxes which are in dispute, usually the taxpayer must pay all taxes assessed against him and thereafter bring suit for their recovery if he thinks that he has been unjustly treated. The investigative agencies of the Treasury Department, with the collaboration of other governmental agencies and particularly of the Federal Bureau of Investigation, do highly effective work in disclosing attempts to escape legitimate tax burdens. So effective are they, indeed, that punishment for the violation of tax laws sometimes takes the place of more severe penalties for other offenses which ought to be applied for violation of state laws but are not applied because of the inability of state governments to get convictions. The best known of the many cases of this kind was federal imprisonment of the notorious Chicago gangster Al Capone for nonpayment of income taxes levied during the days of nominal prohibition. True, this investigative power of federal

22. House Report No. 2333, 77th Cong. 2d. sess., p. 172.
23. See J. Anthony Lewis "Tax Evasions Cost Nation More than Billion a Year," *New York Times,* January 1, 1950.

agents provides a dangerous weapon for unscrupulous officers. Federal officers have been more than once suspected of using income tax investigations or threat of investigations as instruments for the embarrassment of political rivals. A much publicized investigation can do injury whether or not there are legitimate grounds for it. Tax questions are usually so complicated that the general public cannot know whether or not an investigation is justified. By and large, however, the power is presumably used for legitimate ends, and its exercise is essential to the collection of a great deal of revenue.

BORROWING

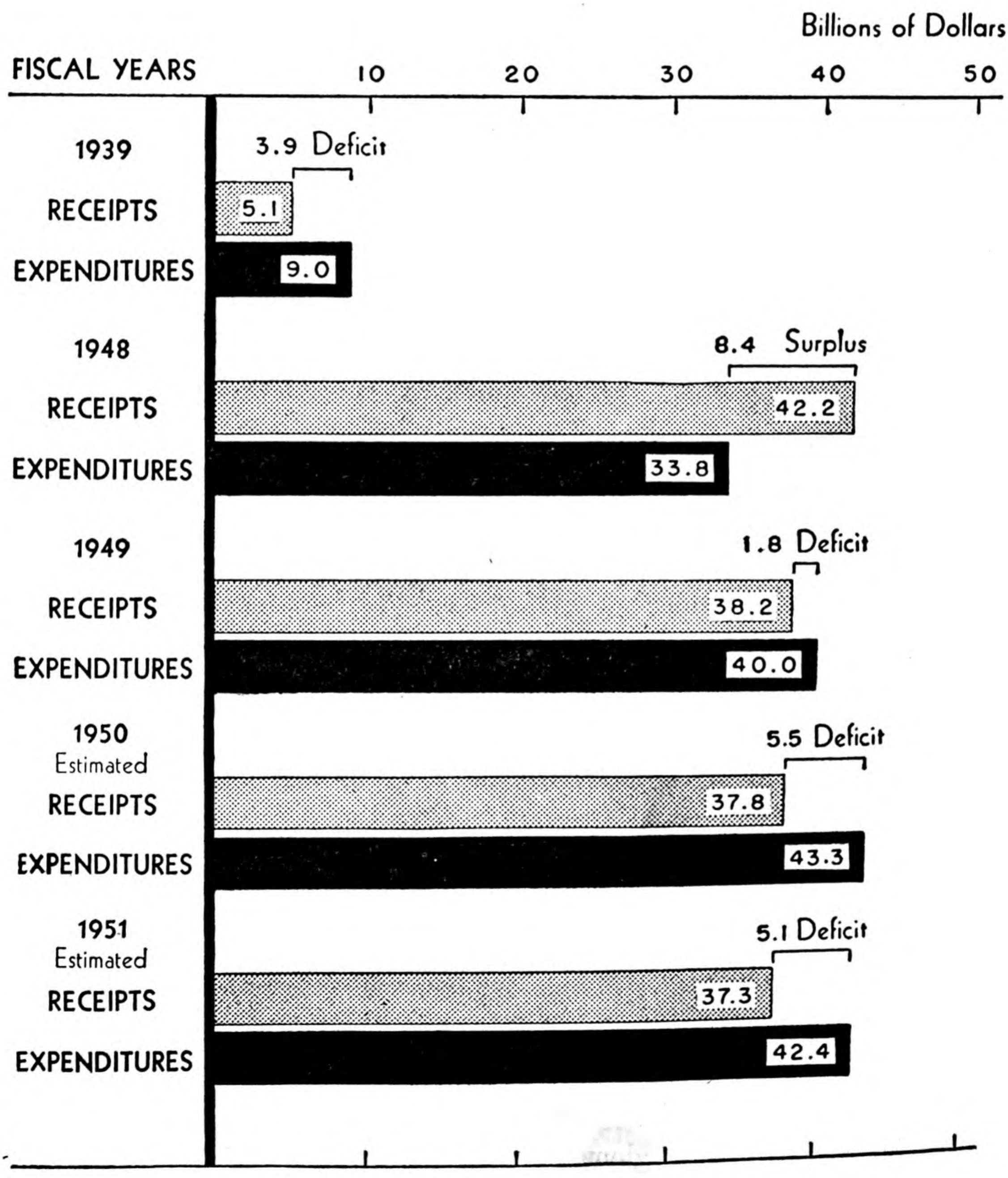
The Strategy of Government Borrowing. Although most government income must eventually be provided by exercise of the taxing power, the government may fill intermediate gaps by borrowing. There is no direct constitutional limitation on the exercise of the borrowing power. The Constitution authorized Congress to "borrow money on the credit of the United States." Presumably, Congress may borrow as long as the nation's credit is good. The national credit has never been exhausted and no one knows its dimensions.

People have always had conflicting attitudes toward the exercise of the borrowing power. There have always been those who believed that governments should pay as they go, that they should live within their taxable means, and that they should borrow only for serious emergencies and repay the debt as soon as possible. They have regarded debt as a menace to solvency and a threat to the maintenance of a sound economy. For people who thought after this fashion, it was a proud moment when, during the administration of Andrew Jackson, the entire national debt was liquidated and the government had to concern itself, not with additional borrowing or raising additional revenue, but with disposing of the funds yielded largely by the prevailing national tariff, not all of which were needed to pay current expenses. The problem, it will be recalled, could not be solved by lowering tariff rates, since such a step would have reduced the needed protection for American industry. The government therefore distributed its treasury surplus to the several states, nominally in the form of loans.

There have always been those, however, who regarded a public debt as by no means an unmitigated evil, and as oftentimes a legitimate and effective instrument of government. Alexander Hamilton, the first Secretary of the Treasury, viewed with equanimity the assumption of state debts and the funding of the total of state and national debt at its face value in securities of the federal government. He regarded government securities as providing a sound basis for a banking system and a circulatory medium. Many of his successors have assumed that a national debt, as long as it is kept within reasonable limits, is a useful government instrument and is not to be feared.

Attempts of the government to cope with the depression of the 1930's were influenced by a conglomeration of monetary theories which are set

forth in many economics texts but which, as they have been applied in government, have been so mixed that they can hardly be portrayed at all. At the beginning of the period a great deal was said about pump-priming, about the necessity for pouring money into the economic mechanism so that it could resume normal operations, whereafter it might be expected to operate without continuing governmental aid. Competing with advocates of pump-priming were advocates of what is called "managed currency," who talked about "compensatory fiscal policy" whereby the monetary mechanisms of the government would be employed indefinitely to stimulate or restrain the flow of production and consumption as circumstances required. In terms of the various theories, the amount of government spend-



BUDGET RECEIPTS AND EXPENDITURES: SURPLUS OR DEFICIT

ing and the decisions to tax or borrow under given circumstances would turn on the estimated effects of such measures on the economy at the time. In the light of such theories it might matter little whether the government had a huge burden of debt or none at all. The important consideration would be maintenance of production and consumption adequate to take care of the goods and services produced. Matters of currency would be largely matters of bookkeeping.

The philosophy of unlimited spending has never completely permeated the American people, and there is no such agreement among financial leaders in the government as to make possible a definition of government policy. Arguments that for various reasons it may be better policy to borrow than to tax, however, tend to soothe the doubts of unwilling taxpayers and may well have played a part in the decision of Congress in 1948 to reduce taxes instead of maintaining them at a high level in order to reduce somewhat our huge national debt. Certain it is that borrowing, like taxation, has innumerable repercussions on the economic order. When borrowing is decided upon, selection of the methods used is governed not only by an estimate of how the necessary funds can be secured but also how they can be secured in such a way as to avoid attendant evils and get the best incidental results from borrowing.

Methods of Borrowing. The subject of methods of government borrowing ties in with the subject of Chapter 24, the control of currency, credit, and banking institutions. In time of war, when the heaviest borrowing has had to be done, the borrowing process has been part of the government program for integrating the entire economy as a war machine. Production for non-war purposes has been discouraged as much as was thought possible. At the same time, by price fixing and other means, the government has attempted to curb the rise in prices which would normally result from the scarcity of goods no longer being produced. Borrowing for war expenditures, therefore, has been coordinated with a program for draining the financial resources of the people away from competition for scarce goods. So it was that during World War II millions of government employees and large numbers of private employees as well had to submit to deduction of part of their income for the purchase of government bonds. The banks of the country, which in normal times do much of their business through making private loans, now bought government bonds in large quantities and subsisted largely on the interest returns from those bonds rather than on interest from loans to private business. Government campaigns, backed with patriotic fervor, effectively encouraged the purchase of various kinds of government bonds by individuals, private corporations, and state and local governments.

Whether in time of war or peace, the government adjusts the kinds of securities offered and the interest rates thereon in such a way as to promote borrowing from all the diverse sources. Savings bonds are issued for sale to individuals in limited quantities with a guarantee of redemption by the government at any time. Other bonds with their maturity date many

years in the future are issued for sale to purchasers in large amounts and subject to sale by one person to another. Among these bonds, some are available for purchase by banks and some by various other purchasers. In addition, the government is constantly borrowing for short periods and for current operations large sums of money at exceedingly low rates.

Interest Rates. When the national debt runs to a high figure, the interest cost also runs high and the interest rate becomes a matter of great importance. At the peak period for World War II, the national debt ran to only a little less than $280 billion. Although by the middle of 1948 the total had been reduced to approximately $252 billion, the amount was still enormous and the interest cost was something more than $5 billion a year, a figure which twenty years earlier would have paid all the expenses of the federal government. Even so, the situation had its bright side in that borrowing for World War II was done at a low interest rate. The average rate of interest on the public debt on December 31, 1946, was 2.06 percent in contrast with a rate of 4.19 percent which prevailed at the corresponding period after the close of World War I.[24]

While from the point of view of carrying the existing national debt it was to the advantage of the government to keep interest rates low, the threat of inflation provided danger from another direction. The financial leaders of the government were torn between their desire to maintain low interest rates and thereby curtail interest payments, and their desire to restrain inflationary expansion by bringing about the raising of interest rates. For a time during and after the war the private needs for money for safe investment were so limited that long term government bonds sold at a premium, even with their low interest return; that is, new purchasers bought them from original purchasers at higher rates than their face value in order to secure the guaranteed return of interest. After the war, as private business became more profitable, the market value of these securities began to decline. For a time during the latter part of 1947, the federal government, acting largely through the Federal Reserve System, "pegged" the market price of these bonds by buying them in when they were offered for sale at less than a prescribed figure. The inflow was so great that the government was eventually compelled to drop the pegged price level, but even so, the Secretary of the Treasury gave assurance that the bonds would not be permitted to drop below par. As the threat of inflation took on added seriousness, the government shifted its position on the raising of interest rates to the extent of voluntarily lifting somewhat the low rate it customarily paid on short term borrowing. As was expected, this step had the effect of raising interest rates elsewhere. The hope was that these mild measures, while adding somewhat to the total of public obligations, would have an over-all beneficial effect in curbing the rising price spiral. By June, 1949, the interest rate on the national debt had risen to 2.236 percent.[25]

24. *Annual Report of the Secretary of the Treasury,* 1945, p. 3.
25. *Annual Report of the Secretary of the Treasury,* 1949, p. 480.

Borrowing vs. Taxation. There is no generally recognized set of rules to prescribe when government should borrow and when it should tax. It is widely assumed that taxation should provide all ordinary revenue for current consumption except for the shortest periods. As indicated above, the experience of the depression of the early 1930's and a body of differing economic theories shook somewhat the prevailing confidence in this belief. Although it is obviously impossible to pay all the costs of a major war out of current earnings, there is justification for high taxation during a war period. Because of the patriotic fervor connected with the war, the people tend to assume that heavy economic burdens ought to be carried by those able to bear them, and so they are likely to welcome exceedingly high taxes, or at any rate not to protest too severely against them. Furthermore, high taxes upon income fit in with the program of holding down prices on scarce goods by reducing purchasing power. In terms of this program, high taxes ought to be maintained until the supply of goods has again become plentiful. However, the relaxation of the struggle toward a common end and the return to private interests creates a demand for reduction of taxes which is hard to resist, even though the reduction may be accompanied by price rises which destroy its value.

Taxation of Income From Government Bonds. As one of the incentives to the purchase of government bonds at low interest rates, the federal government long followed the practice of exempting their income from taxation. The exemption no doubt had some of the desired effect. Yet the financial crises of recent years have shown that even for this purpose the country cannot safely permit the lodgment of large sums of money in places where they cannot be reached by taxation. The government no longer issues tax exempt securities, and the amount of the public debt which is tax free is steadily declining. Since the federal government does not tax state and municipal securities, some discrimination is involved, but it has not seriously curtailed the federal borrowing power. If the inconsistency is remedied, the change is likely to be in the direction of extending federal taxation to income from state and municipal securities rather than a return to exempting income from federal bonds. Taxation by the federal and state governments of one another's securities was long thought to be unconstitutional, but recent Supreme Court decisions have at least cast doubt on the existence of any such constitutional exemptions.[26]

GOVERNMENT–EARNED INCOME

The Postal System. In a *laissez-faire* economy in which government is limited to mere police functions, the matter of government-earned income is largely unimportant. It is there limited pretty much to license and service fees of one kind or another which cannot be legitimately classified as taxation. The United States has never had a completely *laissez-faire* govern-

26. See *Graves* v. *New York ex rel. O'Keefe,* 306 U.S. 466 (1939).

ment, however, and from the beginning has operated a postal system which through postage charges has done much to pay its own way. It is not operated as a profit-seeking enterprise, and deficits are sometimes deliberately incurred, as when unprofitable lines of transportation are subsidized; but the fact remains that the postal system has done much to pay its own way.

Business Operations of Government Corporations. The operations of governmental establishments which both incur expenses and earn income to pay them have greatly expanded in recent years. The production and sale of electric power and other enterprises operated by the Tennessee Valley Authority provide an outstanding illustration. Various other government corporations operate in a similar fashion and, indeed, are established as corporations to facilitate such operations. The total of income earned in this way in comparison with the total received by the government from other sources is still quite small. The fact remains, however, that the character of the changes in the economy which have brought about this development may in the future lead to its great expansion. Government may enter upon national defense projects, as it did during World War I in the Muscle Shoals development which later became the heart of the Tennessee Valley project, and may in that connection develop business projects which are worth maintaining. It may enter activities which are needed for the public welfare but which involve risks great enough to discourage private development. For example, unless private enterprise solves the problem of low-cost housing for low income groups, the federal government may be compelled to go more deeply into that activity than it has yet gone, in spite of the opposition of conservative leaders; and if so, the government may find it necessary to operate the projects which it develops. What happens in this field will depend in part upon the philosophy of the group which happens to be in power in the federal government and in part also upon the enterprise displayed by private business.

In any event, the sources of government funds — taxation, borrowing, and earning — have all been tapped in the last two decades on a scale never dreamed of before that time. Government spending and credit control have grown proportionately, as we shall see in the next two chapters.

References

Percy W. Bidwell, *The Invisible Tariff* (Council on Foreign Relations, 1939).
———, *Tariff Policy of the United States; a Study of Recent Experience* (Council on Foreign Relations, 1933).
Roy G. and Gladys C. Blakey, *The Federal Income Tax* (Longmans, Green, 1940).
R. Blough et al., *Tax Relations Among Government Units* (Tax Policy League, Inc., 1938).
Harold M. Groves, *Financing Government* (Holt, rev. ed., 1945).
———, *Post War Taxation and Economic Progress* (McGraw-Hill, 1946).

Alvin H. Hansen, *Monetary Theory and Fiscal Policy* (McGraw-Hill, 1949).
Seymour E. Harris, *How Shall We Pay for Education?* (Harpers, 1948).
———, *The National Debt and the New Economics* (McGraw-Hill, 1947).
Albert G. Hart, E. G. Allen, et al., *Paying for Defense* (Blakiston, 1941).
Lewis H. Kimmel, *Taxes and Economic Incentives* (Brookings, 1950).
Roswell F. Magill, *The Impact of Federal Taxes* (Columbia University Press, 1943).
Sidney Ratner, *American Taxation, Its History as a Social Force in Democracy* (Norton, 1942).
Frances B. Sayre, *The Way Forward; the American Trade Agreements Program* (Macmillan, 1939).
Paul J. Strayer, *The Taxation of Small Incomes* (Ronald, 1939).
Henry C. Simon, *Federal Tax Reform* (University of Chicago Press, 1950).
Committee on Post War Tax Policy, *A Tax Program for a Solvent America* (Ronald, 1945).

23

Government Spending

The financial problems of nations, as of individuals, include not only the acquisition of income but the spending of it in such ways as to secure maximum benefits. There is always the risk that money will be spent wastefully or for the wrong purposes or at the wrong time. There is danger, in government, of improper coordination of expenditures, duplication of effort, conflict of agency endeavors, and failure to integrate measures to get the best results from expenditures. There is danger that expenditures will be measured by agency demands or by skillful private lobbying rather than by public need. There is danger that the financial program will bog down in policy conflicts between Congress and the President or even between different segments of the executive branch. It is the purpose of this chapter to tell something of the methods and machinery used by the federal government to cope with all these problems.

EXECUTIVE PLANNING OF THE BUDGET

Departmental Initiation. The Constitution provides that "no money shall be drawn from the treasury, but in consequence of appropriations made by law." Thus however powerful the executive, or however great the need for funds, the formal control of the national purse remains in the hands of Congress. The executive must get appropriations from Congress before it can take any action which involves the expenditure of money. Since most governmental action calls for expenditure in lesser or greater amounts, Congress maintains a degree of control over governmental policy through its control of expenditures as well as through the exercise of its other powers. Congress by itself, however, is poorly equipped to plan the governmental budget. In innumerable matters, it must rely upon agencies of the executive branch to provide information on amounts and purposes. Since the adoption of the Budget and Accounting Act of 1921, the executive branch, acting largely through the Bureau of the Budget, has prepared and presented to Congress annually a statement of its total financial needs. In order to make up the consolidated budget, the Bureau of the Budget, although it holds hearings and does some continuous spot checking of the

several agencies, must rely heavily upon the statements of needs presented by the agencies to the bureau.

All departments or other agencies of considerable size have officers with varying titles who are primarily concerned with budgetary matters. In the larger agencies, these officers have subordinates in the divisions or bureaus of the agency who are likewise concerned with the budget problems of their units. The estimating of future financial needs involves a great deal of work and careful planning. Sometimes even before Congress has voted its appropriations for the fiscal year immediately ahead, the departmental and divisional budget officers begin compiling a statement of needs for the succeeding year, using blanks and following instructions provided by the Bureau of the Budget. In agencies which perform routine functions with little change from year to year, the task of estimating needs for as long as two years ahead may not be difficult. Where departmental or divisional operations are likely to be conditioned by a great many unknown factors — such as the threat of war, the brightening of hopes for peace, the spiralling of inflation, or the coming of depression — making budgetary estimates is extremely difficult. Some of the questions, furthermore, will turn on policies to be sponsored by department heads, the President, or Congress. The need for personnel for the Anti-trust Division of the Department of Justice, for example, will depend on how seriously the responsibility for enforcing the anti-trust laws is to be taken. Appropriations for the Bureau of Reclamation of the Department of the Interior should depend a great deal on whether or not governmental policy calls for making available new agricultural and other resources. Some estimate of needs has to be worked out in spite of these uncertainties. It may be done in collaboration between the top departmental budget officer and his subordinates after consultation with the department head. The budget officer brings together and consolidates the several statements of the needs of his department into a single departmental budget which is to be submitted to the Bureau of the Budget at a date specified, usually in early autumn.

Action by the Bureau of the Budget. The budget requests of the several departments and other agencies are allocated for examination or "processing" by officials within the Division of Estimates of the Bureau of the Budget. These officials go into the estimates of need, check them against evidence already in their possession, make such special inquiries as they see fit to make, and hold hearings at which the budget officers and other representatives of the departments appear before them to explain and justify their requests.

From the Division of Estimates the several budget requests as approved are sent to the Fiscal Division, where they are coordinated and where the total budget proposal for the executive branch is worked out. Officials of this division attempt to iron out conflicts of program and duplication of effort in the several agencies. They seek to utilize the work of the Administrative Management Division to improve the efficiency of governmental

operations pursuant to directions sent down from the President. Through the Director of the Budget, they attempt to bring a whole slate of recommendations into harmony with policy as envisaged by the President. Before final adoption, the voluminous statement in all its arithmetical detail is submitted to the President for examination. When the President has given his approval, the entire budget proposal is published in a gigantic volume consisting of hundreds of pages of finely printed figures.

The proposed budget is now ready for submission to Congress. The Bureau of the Budget works out for the President a budget message which emphasizes points in the budget to which the President wishes to draw attention. It indicates trends in national finances, warns of dangers, and summarizes the steps which he believes should be taken to keep finances on a sound basis during the ensuing fiscal year. This message is submitted to Congress near the beginning of each regular annual session soon after the delivery of the President's annual message on the state of the union. The strategy of the message is to explain and make the best possible case for the President's financial program as a whole in order to provide the financial underpinning for his over-all governmental program.

Significance of the Executive Budget. The proposed budget as submitted to Congress by the President is not necessarily the budget which Congress will authorize. Congress could, if it chose to do so, disregard it altogether. In practice, Congress makes great use of it in working out its own ideas of what the content of the budget should be. The device of working out the budget in the form of an executive proposal was adopted in 1921 after long years of experience with less satisfactory arrangements. Until that time, each department worked out its own budget requests, which were submitted to Congress through the Treasury Department without any attempt at executive coordination. Congress received from the executive no adequate guidance in the proper allocation of funds among the competing departments. Congress oftentimes sought to keep expenditures within reasonable scope by paring all departmental requests by percentages of the totals asked for. Departments developed the counter-strategy of asking for far more than they had any hope of getting, so that their needs would be adequately met even after percentage reductions had been made.

Long before the 1920's, many cities and states had found such unsystematic methods of budgeting too costly to continue. For their own protection, they had resorted to the device of an over-all budget worked out and systematized under the direction of the executive and then submitted to the legislature for such action as it saw fit to take. President Taft, concerned about the increasing difficulties of balancing federal expenditures and federal revenues, had appointed a Commission on Economy and Efficiency which recommended the executive budget plan. The Commission worked out a sample budget. President Taft submitted it to Congress shortly before his retirement from office, but Congress, looking upon the President as discredited by the election of 1912, disregarded the recom-

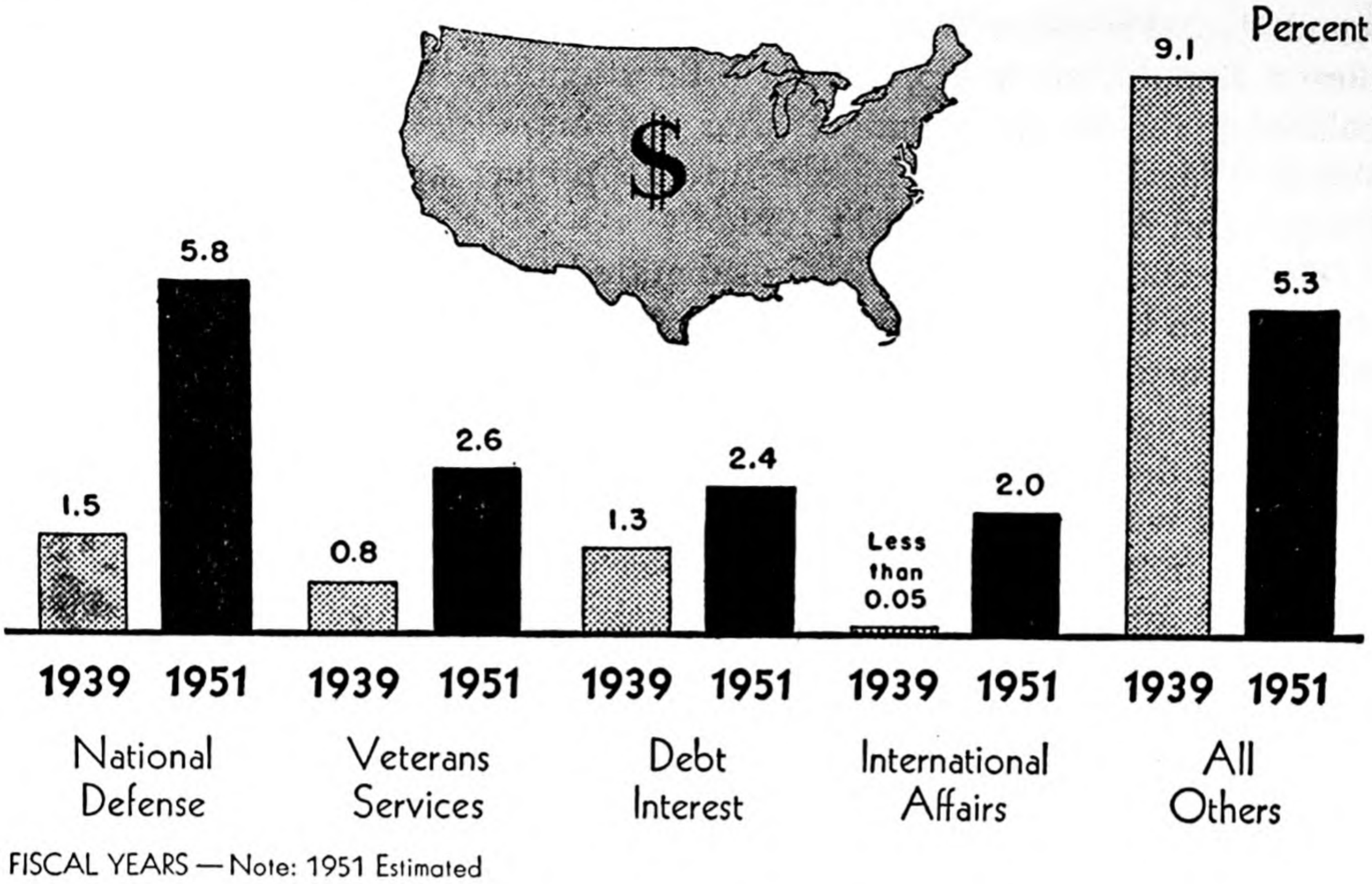
mendation. President Wilson, perhaps partly because the proposed reform bore a Republican stamp, gave it little attention. Faced with the task of balancing the national budget after the unprecedented expenditures of World War I, Congress picked up the project again and enacted the Budget and Accounting Act of 1921.

The executive budget which is submitted to Congress by the President differs from the departmental budgets first transmitted by the Secretary of the Treasury in that many of the extravagant and duplicate requests of individual agencies have already been pared down or eliminated by the Bureau of the Budget. That bureau and the President whom it serves are concerned with the budget as a whole and with securing its enactment by Congress in such a way as to support as fully as possible the President's policy. It knows that Congress will look to over-all totals as well as to individual expenditures. It knows that if too many proposals are obviously too high, the confidence of Congress in the work of the bureau will be greatly impaired and the entire budget may be endangered. While the bureau is an agency in the Executive Office of the President and most of its members are among those administrators who most enthusiastically label themselves as "President's men," the bureau builds up its own prestige in Congress by the scientific character of its work. When both branches of the government are in the hands of the same political party, it wields tremendous power. Its position is so strategic that its power is not inconsiderable even when Congress is dominated by a party other than that of the President.

CONGRESSIONAL ACTION ON THE BUDGET

Congressional Reception. Congress receives the President's budget proposal with mixed feelings. If the same political party controls both branches of the government and if the President is popular with a majority of the legislators, a general welcome is likely to be accorded to his financial recommendations in spite of individual differences here and there. If there is party division between the two branches, if the President is unpopular with a wing of his own party, or if Congress is sharply divided on matters of economy versus free spending, the budget proposal may run into trouble.

The attitude of Congress toward the executive budget is likely to be cool for still other reasons. Much of the power of Congress over the operations of the government is exercised through its control of the purse. To the extent that it permits the President to prescribe expenditures, it permits that power to pass into his hands. Again, government expenditures touch sensitive spots in relations between members of Congress and the people who elect them. Legislators like to keep a free hand in such matters for political reasons. Because all constituents are opposed to high taxes, they are likely to be suspicious of detailed budgets integrated in the executive branch which run to huge totals, even though they may understand little of how to cut the totals without doing damage.



BUDGET EXPENDITURES: PERCENTAGE OF NATIONAL INCOME

The Proposed Legislative Budget. The frustration of Congress at its inability to keep budget totals within the range of government income has been growing more obvious in recent years. In order both to reassert the priority of its own authority and to bring estimates of revenue and expenditure into closer relation, Congress in the Legislative Reorganization Act of 1946 provided for what it called a legislative budget. It authorized the revenue and appropriations committees of the two houses or subcommittees thereof to meet at the beginning of each regular session of Congress and "after study and consultation, giving due consideration to the budget recommendations of the President, report to their respective houses, a legislative budget for the ensuing fiscal year, including the estimated over-all federal receipts and expenditures for such year."[1] The report was to contain a recommendation for the maximum amount to be appropriated and was to be accompanied by a concurrent resolution adopting the budget worked out by the joint committee and fixing the maximum amount to be appropriated for expenditure in the year in question. The report was to be made by February 15 of each year and was obviously intended to precede enactment of any major appropriation bills. In spite of the obvious soundness of an attempt to look at the totals of income and expenditure in relation to one another before making any appropriation, the arrangement had not, as of 1950, worked out to the satisfaction of anybody. The four committees of which the joint committee was to be composed were preoccupied with the heavy work of their routine tasks. They were unable to work out

1. 60 Stat. 833.

adequate estimates of income and expenditure in time to report at the designated date. The estimates eventually arrived at were so obviously colored by political considerations as to be highly untrustworthy. The device has been pretty generally regarded as unworkable.

Committee Hearings. The President's message and his detailed budget proposal are referred to the Committee on Appropriations of the House of Representatives. This reference to a single committee, like the preparation of the executive budget, dates only from the early 1920's. Prior to that time, largely independent appropriations committees received separate budget requests, held hearings on them, and reported them for action by the House. The several committees were merged in an attempt to unify action on the legislative as well as the executive side of the proceedings. Only in part, however, has the unification been successful. The gigantic Committee on Appropriations, which in 1950 consisted of twenty-seven Democrats and eighteen Republicans, does its real work through nine subcommittees.[2] The ranking members of these subcommittees oftentimes hold their positions for a number of succeeding terms and acquire great expertness in their respective fields. Subcommittee memberships are allotted by the powerful committee chairman, although he is subject from time to time to very strong pressure from representatives and outside interests desiring the membership of particular men on particular subcommittees. Representatives from the western states, for example, are often eager to secure membership on the subcommittee having to do with the appropriations for the Department of the Interior, which is concerned with reclamation and with the national parks, or on the agriculture subcommittee which likewise has jurisdiction over matters in which they are interested.[3]

Each subcommittee, presided over by the ranking member of the majority party, holds hearings on that portion of the budget proposal allocated to it. A subcommittee may deal with appropriations for a single department, as in the instance of the Department of Agriculture; for a group of departments, as in the instance of the Departments of State, Justice, and Commerce; or for a considerable number of agencies, like the great many which are brought together under the heading of independent offices. The subcommittee expects the head of the department in question to begin the testimony on the needs of his department. Although the department head is not expected to know in complete detail the work or the needs of all agencies within his department, he is supposed to be able to discuss policy and program as a whole and to show evidence that he is the head of the department in more than name alone. If questions of detail are asked, he is permitted to refer to his principal budget officer and to other subordinates who are likely to be in attendance. The subcommittee usually treats him with the deference befitting his high office, but it also expects a show of

2. This was the number as of March 30, 1950.

3. For discussion of many aspects of the subject see Arthur W. Macmahon, "Congressional Oversight Over Administration: The Power of the Purse," *Political Science Quarterly,* vol. LVIII (June and September, 1943), pp. 161–90, 380–414.

deference to itself as an arm of Congress, which has final power in financial matters.

After testimony by the department head, the subcommittee gets down to more specific work through the questioning of subordinate departmental officers. It is guided in part by its own accumulated experience in this kind of work and in part also by the permanent staff of the Committee on Appropriations which is allocated to the several subcommittees. Every important subcommittee has in its service an assistant clerk or official of some other designation who is equipped to pilot the committee members through the complicated contents of their segment of the budget proposal. Many of the items involve little or no questioning; others, and particularly those involving increases, must be explained in the fullest detail. Department officials may be questioned sharply about the operations of their agency, and must sometimes submit to stinging criticism of their performance under budget allotments of previous years. If they answer questions with frankness and courtesy and with a showing of proper respect for the final authority of Congress, they are usually treated with courtesy in return. If, on the other hand, they have the temerity to hint that the judgment of their department or of the Bureau of the Budget should be conclusive upon Congress, the subcommittee has ways of making them exceedingly uncomfortable and may permanently record its displeasure by cutting appropriations. If there is either open or latent antagonism between Congress and the President or Congress and the department in question, the subcommittee hearings are calculated to expose the budgetary evidence of executive strategy. The departmental representatives, on the other hand, attempt to pilot the questioning away from issues which are likely to cause embarrassment. There are frequent deep sighs of relief in various departments when the report comes back that no embarrassing questions were asked about items upon which particular projects depend.

The Subcommittee Report. As the hearings proceed, the chairman of the subcommittee and his staff assistants work the subcommittee recommendations into the form of a bill or part of a bill for enactment by Congress. Although it may reduce totals or occasionally expand them, the bill as presented is likely to resemble closely the President's budget proposal as drafted by the Bureau of the Budget. When the subcommittee draft is complete it goes to the full Committee on Appropriations with a report explaining it. In theory the full committee has been expected to coordinate the recommendations of the several subcommittees, though actually there is very little coordination.[4] In the past the full committee has accepted the subcommittee drafts virtually as presented and has reported them to the House of Representatives as separate appropriation bills.

The Omnibus Appropriation Bill. Perhaps in recognition of the failure of the "legislative budget" device as an instrument of control, the Com-

4. *Ibid.*, p. 386.

mittee on Appropriations in 1950 abandoned the device of submitting each subcommittee recommendation as a separate appropriation bill and merged a considerable number of them in an omnibus appropriation bill with eleven "chapters," running to a total of more than $27 million. It was believed that with all ordinary governmental expenses merged in a single bill — the cost of foreign aid, interest on the public debt, and certain other fixed costs were excluded — the full committee and Congress could see the budget as a whole and act upon it more intelligently than when separate bills were submitted at different times. The Committee on Appropriations allocated four days for discussion of the subcommittee reports, hoping thus to provide for a better integrated budget than in earlier years. Reports on the discussion indicate, however, that the subcommittee recommendations were accepted pretty much as made, and that the full committee did little to reduce budget totals or to reallocate funds.[5] The Committee on Appropriations reported to the House a bill running to 431 pages.[6] In its report, which ran to 337 pages, the committee, as if apologizing for its failure to make more reductions than those therein revealed, noted that "Economy neither begins nor ends in the Halls of Congress," [7] and enumerated some responsibilities of the executive in this field.

Consideration in the House. The Committee on Appropriations submits to the House of Representatives its draft of an appropriation bill, the committee report on it, and the volumes of subcommittee hearings which, for the omnibus bill mentioned above, ran to thousands of pages. With the aid of these three kinds of documents and such additional help as can be provided by the Legislative Reference Service and the various executive agencies, any member of the House could in time equip himself with knowledge of the bill as a whole and of its details. In fact, however, no member has the necessary time. The bill is usually taken up for consideration almost immediately after the report is filed. There is little or no time for reading the hearings except as a member may check on particular items. Even the report may not be read, and it is safe to say that no member of the House sits down and reads from beginning to end an appropriation bill running to more than four hundred pages.

Discussion on the floor of the House is begun after the two parties agree on the division of time between them. If the bill covers only a limited area of appropriations, it is usually agreed that the time of debate will be limited to a certain number of hours, whereafter additional time will be allotted for submitting amendments. For the omnibus bill of 1950, it was agreed that the time for general debate would be unlimited and would be divided equally between spokesmen for the two political parties. Some thirteen hours or more were used in general debate before the proposal of amendments was begun. Within that time, or any other reasonable period,

5. *Congressional Record* (temporary daily edition), April 3, 1950, pp. 4682–83.
6. House Report No. 7786, 81st Cong., 2d. sess.
7. *General Appropriation Bill, 1951,* House Report No. 1797, 81st Cong., 2d sess., p. 9.

it would of course be impossible to discuss such a bill in detail. A general appropriation bill reflects no such body of philosophy as to raise discussion of its over-all purpose. The debate, therefore, turns almost always upon particular controversial items which the subcommittee has decided adversely to the interests of a member or group of members. The amounts involved in these items may bear little relation to the total expenditure provided for in the bill; they may or may not reflect critical items in the President's program. The disputes often involve cuts in the amounts requested at points where the antagonism of one or more members of the subcommittee has been stirred. A member may disapprove of federal aid to education, or federal construction of low cost housing, or the construction of a post office in Pinhook, Indiana, or the extension of a flood control project in Arkansas. He may be honestly opposed to the project or he may be hostile to it because it is being operated by or will work to the benefit of a political enemy or the competitor of a constituent. It may be argued that particular items, such as appropriations for the military services, should be increased. The item in controversy may represent the considered judgment of thoughtful members of the subcommittee, and the opposition on the floor may be inspired largely by selfish interests; or the difference may be one of judgment, with motives of sound statesmanship on both sides. The point is that the bill is not discussed in its entirety or in terms of all its individual items, but in terms of scattered items brought up for consideration because of special circumstances. This means that the genuine legislative consideration which the bill receives comes largely not on the floor of the House or even in the Committee on Appropriations as a whole, but in the subcommittees. If disagreement is between the two political parties or between Congress and the President, many members of the House may give it serious attention, but their decision will be based not primarily on the intrinsic merits of the case, into which they may or may not inquire, but on relevant political considerations.

Senate Committee Consideration. After the appropriation bill has been passed by the House, it goes to the Senate, which again refers it to a Committee on Appropriations. That committee is substantially smaller than the House committee, and in 1950 consisted of twelve Democrats and nine Republicans. Because it is smaller, its members serve on more subcommittees and therefore develop a broader familiarity with budget problems. In comparing the work of the Senate and House committees, Arthur Macmahon notes that

> In a sense, the Senate Committee on Appropriations sits in an appellate capacity. It circularizes the departments to find out if they have particular items to present in its hearings. Often the agencies choose to take their small cuts at the hands of the House and let well enough alone. But administrators value the opportunity for appeal that the Senate committee affords. The House members, for their part, regard the Senate group as undisciplined and irresponsible.[8]

8. See Macmahon, *op. cit.*, p. 156.

Senate subcommittee hearings are ordinarily much less expansive than those in the House and in large part involve items on which the House has refused to accept the recommendations of the Bureau of the Budget. The Senate committee tends to be somewhat more judicial in its attitude. If Congress and the presidency are in the hands of the same political party, deviations from presidential leadership which are reflected by the action of the House may be corrected. In any event, the Senate committee acts after enough time has passed to show public reactions to controversial items in the bill.

The Senate Floor. The appropriation bill goes to the Senate in routine fashion after hearings briefer than those of the House subcommittees and with a report which is likely to emphasize only the more controversial items. Debate in the Senate is less restricted than in the House, and partly for that reason and partly because the Senators are likely to be better known individually, the Senate debate may receive more public attention. When the bill has been passed and sent to conference committee, the leading members of the appropriations committees of the two houses attempt to work out compromises in the respective positions.

Presidential Handling of Appropriation Bills. Since appropriation bills are seldom passed in the exact form recommended by the President and the Bureau of the Budget, the President is seldom completely satisfied with them. Unfortunately, from his point of view, the Constitution gives him no power to pick and veto particular items in such a bill. He must accept or reject the bill as a whole. Since the financial sustenance of some branch of the government is involved in every appropriation measure, he hesitates to use his veto power where such a measure is involved. He sometimes does so, however, as when on June 14, 1948, President Truman vetoed a bill making appropriations for the Federal Security Agency because the bill, in addition to making the appropriation, also directed the transfer of the United States Employment Service from the Department of Labor to the Federal Security Agency.[9] The action taken by Congress was part of a struggle with the President over the place within the government of certain agencies which had not yet found permanent departmental location. In vetoing the bill, the President emphasized that the change was directed without reference to hearings by the appropriate legislative committees. The matter had been handled exclusively through committees on appropriations, which were rightfully concerned only with appropriations and not at all with general legislative matters allocated to other committees. The device used by Congress was that known as attaching a "rider" to an appropriation bill. Groups in Congress occasionally resort to this device when they believe that in this way they can escape a veto or secure congressional enactment of a provision that would not be enacted as a purely legislative measure. In general, Congress tends to disapprove of this device, and in its

9. *Congressional Record,* June 15, 1948, vol. 94, part 7, p. 8400.

report of March 4, 1946, the Joint Committee on the Organization of Congress recommended that "the practice of attaching legislation to appropriation bills be discontinued." The temptation to use it is occasionally too great to overcome, and presidential indignation at its use is occasionally, as in this instance, strong enough to bring a veto in spite of the fact that appropriations are involved. This particular issue had become a part of a general struggle between Congress and the President, however, and the veto was overriden.

Legislation vs. Appropriations. The committee structure and the rules of Congress demonstrate the belief that the working out of governmental policy and program should be kept separate and distinct from the voting of appropriations to carry out governmental programs. Each house maintains legislative committees to deal with agriculture, banking and currency, labor, foreign affairs, interstate and foreign commerce, and various other subjects. Even though their enactment will call for expenditures, bills dealing with these subjects must pass through these committees. The making of appropriations to carry legislative measures into action, however, calls for action through the appropriations committees. Even though these have subcommittees corresponding somewhat to the jurisdictional areas of the legislative committees, and even though they sometimes consult formally or informally with the legislative committees, the main channels of action are different. Members of appropriations committees tend to think much less about program than about expenditures or the prevention of them. Casual observers were astonished in the spring of 1948 when Congress, after authorizing huge expenditures for European aid, engaged in a second battle over making the actual appropriations and came close to reducing the total by a considerable amount. The reason lay partly in the fact that the Committee on Appropriations of the House of Representatives, dominated by a hard-bitten chairman with a love of restrictive power, was much more concerned about saving money than about saving Europe. Defeated opponents of the program drifted to his leadership and came close to crippling it decisively at the appropriations stage.

The illustration seems to mark as unfortunate the division of machinery for dealing with legislation and with appropriations. Yet in government as in business there is value in having individuals and agencies whose prime preoccupation is watching over expenditures. They perform a necessary function. They must not, however, be permitted to strangle policy in the midst of their legitimate preoccupation. Neither should they, as by attaching riders to appropriation bills, be permitted to take over the making of programs while in the process of financing programs properly made elsewhere.

CONTROL OF FUNDS APPROPRIATED

Agency Discretion. Although the Bureau of the Budget and the appropriations committees require that budget requests be worked out in great

detail, including numbers and grades of employees in the several branches of each agency, Congress makes its appropriations in lesser but irregular detail. Amounts specified range all the way from a few thousand dollars to millions. The appropriating statute does not require that the money appropriated be spent exactly as outlined in the budget request. The agency has considerable freedom in reallocating the amount appropriated. Opinion differs as to whether appropriations should be made in great detail so as to eliminate most of the discretion, or in blanket form so that perhaps even entire departments would have broad freedom under the direction of the President to recast their programs during the fiscal year. The present largely unsystematic practice of making some large appropriations and some small ones represents a poorly thought-out compromise between the two positions.

Control by the Bureau of the Budget. Complete discretion over each item appropriated is not, however, left to the agency for which the appropriation is made. There are always agencies in which an entire year's appropriation would be spent long before the year was out if there were no supervisory restraint. The Bureau of the Budget restrains the process of expenditure so that the total has some prospect of lasting throughout the fiscal year. It also exercises a measure of control where a drastic shift in the mode of expenditure is contemplated so that it fails to conform in important ways to the pattern of expenditure as originally presented to the Bureau of the Budget.

The Bureau of the Budget may even use its requirement that reserves be set up to prevent the too rapid expenditure of appropriations in order to prevent legitimate expenditure for the purpose indicated in the statute if perchance the bureau or the President wishes to prevent the expenditure. It is in part through such control devices that the bureau maintains its continuing authority over the several agencies of the executive branch.

Congress sometimes specifically recognizes this responsibility. For example, in May, 1948, in making an appropriation for military aircraft, Congress yielded to pressure from the Department of the Air Force and other sources to the extent of appropriating more than the President had requested, but it included in the statute the provision that the funds should be spent only on a finding by the President that the contracts for production were necessary for the national defense and that the procurement would result in the "maximum utilization of improvements in aircraft and equipment consistent with the defense needs of the United States." [10] The President called upon the Secretary of Defense, who opposed building up the air force to the full extent of the appropriation, and on the director of the Bureau of the Budget to formulate procedures by which the amount to be spent should be determined. The House report on the omnibus appropriation bill submitted in 1950 included the statement that

> Appropriation of a given amount for a particular activity constitutes only

10. See 62 Stat. 258, 259. For the President's comments see the *New York Times*, May 22, 1948.

> a ceiling upon the amount which should be expended for that activity. The administrative officials responsible for administration of an activity for which appropriation is made bear the final burden for rendering all necessary service for the smallest amount possible within the ceiling figure fixed by Congress.[11]

Some legislators, it is true, demand a wider role for Congress, insisting that adjustments, whether upward or downward, are matters for legislative determination. Representative Carl Vinson, of Georgia, who has a peculiar devotion to the armed services and particularly to the navy, resents any executive interference with the efforts of those services to secure larger appropriations from Congress, and he resents any executive withholding of funds appropriated. He rejects the concept that "the role of the Congress is limited to imposing monetary ceilings on the armed forces — that Congress has no control, and should have none, over how small the armed services should become." He continues,

> I say that to the extent that the Congress accedes to that concept, to that extent the Congress unconstitutionally delegates its responsibilities to the executive branch of the government.
>
> I say that when the armed forces are reduced by others than the Congress, and without prior consultation with the appropriate agencies of the Congress, the American people are thereby deprived of their Constitution-derived control, through their Congress, over the size and type of national defense they want their government to maintain.[12]

Other legislators also have their favorite services with which they do not want executive interference in the way of curtailment of expenditures; but by and large Congress is, or at least pretends to be, more concerned about keeping executive expenditures down than about sustaining or raising them.

The accumulation of unexpended funds in various agencies throughout the government at the end of each fiscal year is sometimes substantial. On the other hand, some appropriations prove inadequate for important needs. New situations arise calling for extended governmental activity, or Congress enacts new legislation providing for programs which were not taken into account in the drafting of the initial appropriation bills. When this happens, the agency which needs the funds, acting through the Bureau of the Budget, makes a request for a supplementary appropriation. Each year sees the enactment of a number of such bills to cope with deficits and meet unexpected needs. Congress provides without hesitation all appropriations needed to meet genuine emergencies, but unexpected shortages in connection with the performance of routine governmental functions are likely to be met, if at all, with a considerable scolding about living within one's means.

The General Accounting Office. To insure the orderly and proper expenditure of appropriations, the Budget and Accounting Act provided for

11. House Report No. 1797, 81st Cong., 2d sess., p. 9.
12. *Congressional Record* (temporary daily edition), April 4, 1950, pp. 4746–47.

the establishment of the General Accounting Office. This office is headed by a Comptroller General who is appointed by the President with the approval of the Senate. To free the office as completely as possible from political pressures, the Comptroller General is given a term of fifteen years and he is ineligible for reappointment. He heads a gigantic auditing establishment which processes each years millions of government checks. In part, the function of the General Accounting Office is auditing, that is, examining expenditures to see whether they have been lawfully made. The powers of the office are so conveyed, however, that it is able to exercise a vast supervisory power to determine in advance what expenditures may be made. It passes upon the warrants by which the Treasury Department from time to time allocates portions of the funds which have been appropriated for particular agencies. Apart from the courts, to which relatively few such problems go, the General Accounting Office becomes the final authority on the legitimacy of large numbers of expenditures.

There is no question about the need for an efficient system of auditing. Errors are easy to make in expending innumerable sums of money, and they must be checked and corrected. There is always danger that money will be deliberately spent for unlawful purposes. Advance control needs to be exercised along with the auditing of expenditures already made. It is widely contended, however, that the advance control should be exercised by the Bureau of the Budget or the Treasury Department and not by a supposedly non-political office such as the General Accounting Office. As was well demonstrated during the early years of the New Deal, that office can easily extend its supervision of expenditures back to the point of substituting its judgment for that of Congress and the President as to what expenditures ought to be made. The Comptroller General during that period was held over from earlier administrations and believed that government should operate only in a highly restricted sphere. Because of his opposition to various New Deal projects authorized by Congress, he postponed or blocked the clearance of expenditures on large numbers of them. He was a technician who used his technical powers to mold government policy and to defeat the policy made by the representatives of the people. The power of the Comptroller General is primarily that which he exercises in saying "no." The existence of his office is justified by its saying "no" to expenditures which are illegitimate. As a non-political agency it gets outside its sphere, however, when it uses its interpretation of legitimacy to defeat programs to which it is politically opposed. It should face its task with something of the discipline of the judiciary; yet a kind of almost evangelical negativism persists in the organization in spite of changes in personnel and governmental attitudes generally. As recently as December 11, 1947, the Comptroller General then in office, Lindsay C. Warren, told a congressional appropriations subcommittee, apparently with some pride, that

> I want to say that I feel personally very strongly, and so do my associates who are here with me today, that the government is entirely too large and

> that it ought to be and must be reduced. We feel that very keenly in the General Accounting Office.[13]

The point is not that the judgment of the Comptroller General in the matter was wrong but rather that the matter is one with which neither he nor the General Accounting Office has any official concern.

Control in Government Corporations. The control of expenditures in government corporations both by the Bureau of the Budget and the General Accounting Office differs somewhat from the control exercised in regular government agencies. One reason for use of the corporate device is that it provides a flexibility of financial behavior which is not possible in full-fledged governmental agencies. Some corporations engage extensively in buying and selling, and receive variable amounts of revenue from their own operations. Initially, the government has allowed them a great deal of freedom in these matters and has given little or no control over them to the General Accounting Office. Congress came to insist upon closer supervision, however, and the responsibility of both the Bureau of the Budget and the General Accounting Office was increased. In order to perform its functions in connection with such agencies, the General Accounting Office has had to adapt for its own use a commercial type of audit which is very different from that applicable to ordinary government agencies. It remains to be seen whether the continued extension of control over government corporations will so impair their efficiency as to defeat their performance of the kind of tasks initially allotted to them.[14]

Changes in Budgetary Methods. It should be kept in mind that the federal budget system is relatively new, that it is still in an elementary stage, and that it is in constant process of change. New adaptations are constantly being made with the growth of experience. Furthermore, there is growing awareness of the fact that an adequate budget system should treat expenditures and their control not as the primary aspect of budgeting but as only one of the major aspects. The planning of income should receive more careful attention and should be more carefully integrated with the planning of expenditures. Furthermore, the expenditure side of the budget should reveal a great deal more than it now does of the actual financial status of the government. At present it discloses finally little more than the relations of income and expenditure totals. It does not properly differentiate between those expenditures which are completely consumed or destroyed and those which remain as assets of the government. It does not adequately distinguish between funds provided for a foreign

13. *Independent Offices Appropriation Bill for 1948,* Hearings, subcommittee of House Committee on Appropriations, 80th Cong., 2d sess., p. 94.

14. For discussion see C. Herman Pritchett, "The Government Corporation Control Act of 1945," *American Political Science Review,* vol. XL (June, 1946), pp. 495–509, and Marshall E. Dimock, "Government Corporations; A Focus of Policy and Administration," *American Political Science Review,* vol. XLIII (October and December, 1949), pp. 899–921, 1145–64. See also *Reference Manual of Government Corporations,* Senate Document No. 86, 79th Cong. 1st sess.

loan or for the erection of government buildings or for the construction of battleships, on the one hand, and on the other hand those spent for the payment of salaries, the relief of victims of disasters, and the actual waging of wars. It treats income from the sale of surplus government goods much as if it were current income in the form of taxes rather than merely the liquidation of capital assets.

Need for a Capital Budget. One of the great needs of the government, indeed, is for the establishment to the fullest extent possible of what is called a capital budget. A capital budget would disclose not merely the totals of annual income and annual expenditure, but also the relations of those items to the changing totals of the value of capital equipment. There would be difficulties, it is true, some of which are met by business enterprises which operate in terms of capital budgets while others would be peculiar to a governmental establishment. Yet there would be great value in knowing the changes taking place in governmental investments in loans, buildings, and equipment of all sorts. In spite of the difficulty of assessment, because of the rapid rate of obsolescence and depreciation and for other reasons, there would be great value in showing the character of the governmental investment in equipment for national defense and war. It is questionable whether even the Department of Defense itself has an adequate conception of our investment in battleships, airplanes, guns, and other war materials. While such equipment is to be measured by its probable effectiveness against an enemy rather than by its monetary value, the expenditures involved are so huge that monetary measurement is badly needed. In the budget document prepared for submission to Congress in January, 1950, the Bureau of the Budget made a beginning, though only a beginning, toward working out a capital budget statement.

A Performance Budget. The Hoover Commission was highly critical of the method by which budget data were submitted to Congress. Departmental statements included long lists of personnel classifications needed in the departments, listing employees by grades, titles, and salaries. They did not, however, group expenditures according to major functions to be performed by departments. The Commission recommended what it called a "performance" budget, whereby expenditures would be listed not according to personnel but according to groups of functions. By such an arrangement, it was argued, the department could make clear to Congress what functions it was being asked to support and how much they would cost.[15] With the budget submitted to Congress in January, 1950, the President, or the Bureau of the Budget, began to transform budget statements into the

15. *Budget and Accounting,* House Document No. 84, 81st Cong., 1st sess. Illustrating from the Navy Medical Service, the Commission recommended that data be classified in such categories as Medical and Dental Care Afloat, Mental and Dental Care Ashore, Care of the Dead, Instruction of Medical Department Personnel, Medical and Dental Research, Medical and Dental Supply System, Island Government, and Departmental Administration.

performance budget form and presented a simplified statement of the same kind for the information of the public.[16] The change in method is not yet complete. The new method seems much more revealing than the old, but members of Congress who are accustomed to thinking in terms of numbers of employees in the various grades protest the lack of such information.[17] It remains to be seen what kind of compromise will be worked out as legislators and economists continue to differ on the kind of budget information likely to be of greatest value.

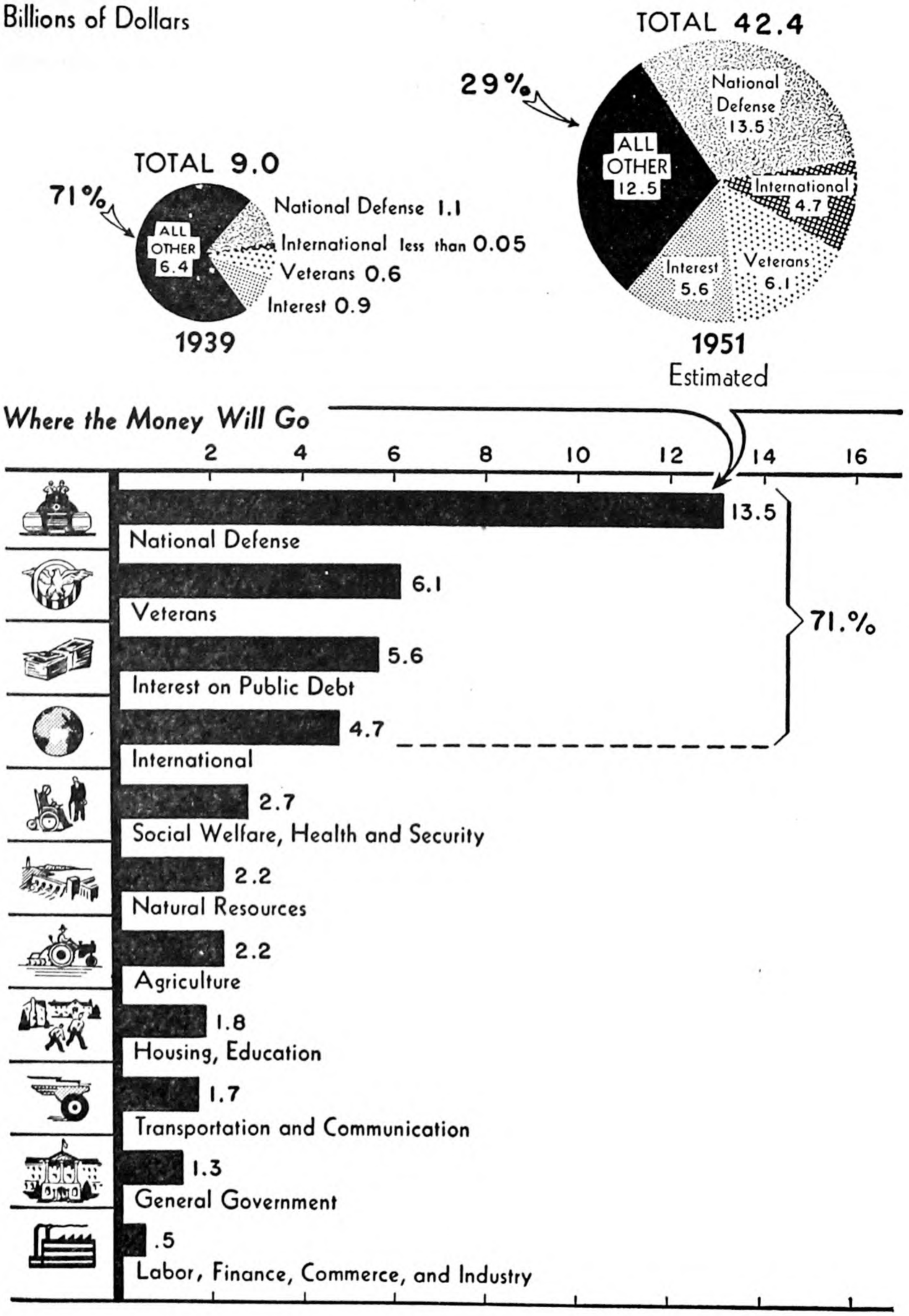
CHANGES IN FEDERAL EXPENDITURES

The March of Totals. A study of the annual totals of government expenditures reveals a panorama of continuous change. The rate is subject to upward spurts followed at times by recessions, with the over-all trend always upward. The annual report of the Secretary of the Treasury for the fiscal year ending June 30, 1850, disclosed an expenditure total of approximately $43 million, of which more than $3,500,000 was spent merely in the sense that it was used to fund that amount in treasury notes. A table prepared by the Bureau of the Budget shows the annual growth of expenditures from 1900 to 1948.[18] The expenditure of $521 million in 1900 was twelve times the figure of half a century earlier. With occasional backward steps, the figure rose to $734 million in 1916, and then in 1917, under the impetus of World War I, it leaped forward to $1,978 million, our first billion-dollar total. The annual total has never been less than a billion since that time.

The war years, 1918 and 1919, brought totals of more than $12 and $18 billion respectively, whereafter the annual figures dropped off to $6 billion, then five, then three, and finally, for 1927, a figure just less than three billion. The total went to more than three billion in 1928 and has never been lower since that time. It reached more than four billion in 1932, dropped to less than four in 1933, and then with 1934 started a long upward climb with more than six billion. It ranged in round figures from seven to nine billion from 1935 through 1940, and then from 1941 through 1946 ran up wartime billion dollar figures of 13, 34, 79, 95, and 100. With the cessation of military hostilities, the amount dropped — again in round numbers — to $63 billion in 1946, $42 billion in 1947, and, as shown in the report of the Secretary of the Treasury, to $37 billion in 1948. Then, with the program of aid to Europe and the rearmament program, the total went back to more than $40 billion in 1949 and continued thereafter above that figure.

The principal disclosure of these figures is the tremendous cost of war and economic depression. Two columns of the table mentioned above disclose a comparison between five war-related functions and all other

16. See Bureau of the Budget, *The Federal Budget in Brief, Fiscal Year 1951.*
17. See Representative John Taber, *Congressional Record* (temporary daily edition), April 3, 1950, p. 4688.
18. *Congressional Record,* March 11, 1948, vol. 94, part 2, pp. 2576–77.



BUDGET EXPENDITURES: WHERE THE MONEY WILL GO

functions of the federal government. For the fiscal year 1919, the five war-related areas of cost ran to 97.5 percent of the total. Although the percentage declined in succeeding years, veterans' services and benefits, and interest on the public debt which was incurred largely as a result of the war, kept the percentage high. For the period from 1934 to 1940 inclusive, however, New Deal spending to provide relief, restore prosperity, and generally to promote the public welfare changed the situation to such an extent that more than 50 percent of the total of growing expenditures went to strictly non-military agencies. For 1939, indeed, the percentage went as high as 70.5. Then, with 1941 and the preparations for World War II, military expenditures again loomed large, running in 1945 to a percentage of 92.4. Thereafter the military declined somewhat, but with a subsequent increase not shown in this table which was brought about by strained relations between the United States and Soviet Russia.

Significance of Expenditure Totals. Beyond the obvious evidence of the cost of war and depression, the annual expenditure totals are hard to interpret. Even without punctuation by wars and depressions, the trend was generally upward. It was rising with the population, with the growing amount of business done, and with the changing conceptions of the functions of government in a modern industrial society. While the expenditure of more than $36 billion for the fiscal year 1948 was a far cry from the more than $3 billion spent in 1929 in the heyday of the prosperity of the 1920's, it is to be noted that the total national income of the United States rose in the same period from less than $80 billion to a record rate of $248 billion a year recorded in the second quarter of 1948.[19] Part of the difference was the product of inflation in the latter period, but inflation had its effect on the governmental budget figure as well as on the national income. Industry in the latter period was working at a capacity hardly dreamed of a few years earlier. The figure of 60 million jobs which, in the midst of the war, conservative predictions said could never be attained in time of peace had been exceeded. In short, it was obvious that as long as the high level of national income could be maintained, a national governmental expenditure in the vicinity of $40 billion adequately met by high level taxation was not a menace to national economic welfare.

It is probably fortunate that there are large numbers of people who contend that government engages in too many activities and spends too much money. Pressure of this kind is needed to keep expenditures in line. This opposition would exist whether or not it were fortunate, because people dislike to pay taxes and resent it when government competes with or supplants private enterprise. Yet the people who would drastically reduce the national budget ought to assume some responsibility for showing where the reductions should be made. In his budget message of January, 1950, for the fiscal year 1951, President Truman asked for $42.4 billion. Of that

19. Department of Commerce, *Survey of Current Business,* August, 1948, p. 4. For the second quarter, 1950, the rate was 270 billions. *Ibid.,* August, 1950, p. 6.

amount $13.5 billion were earmarked for national defense. In view of existing bad relations with the Soviet Union it seemed as likely that the amount would be increased by congressional action as that it would be diminished. An amount of $6.1 billion was allocated to veterans. The millions of veterans and their families constituted such a broad segment of the population and such a powerful pressure group that reduction here seemed unlikely. An amount of $5.6 billion was allocated to interest on the public debt, which clearly had to be paid. An amount of $4.7 billion was set aside for international expenditures of various kinds, including civil and military assistance to European countries to keep them out of the Soviet orbit. Although reductions were possible here, making them might well endanger our world position. These items ran to a total of 71 percent of the proposed budget.

Much is said from time to time about the need for greater efficiency within the executive departments and other agencies of the government and the probable wastage on excess personnel. The entire budget estimate for general government, however, ran to only $1.3 billion, a very small item indeed compared to the total. Clearly, therefore, no large proportionate savings could be made here. While the 1951 budget was under consideration, the Senate Committee on Expenditures published figures to show that out of the budget increase since 1948, $5,698,000,000 was contributed by "so-called nonwar connected domestic functions." This amount was distributed among the fields of agriculture, natural resources, housing, social welfare, transportation, and education.[20] These increased expenditures, it was argued, ought not to be permitted when a budget deficit of several billion dollars was in prospect. Reductions could be made here, however, only in the face of opposition from strong interest groups and against arguments that government was obligated to balance the economy through making wise expenditures and to cushion the harshness of the operations of our economic machinery.

Until the 1930's the constitutional power of the federal government to spend for the general welfare, as for social security, housing, and other services, was in dispute. The Supreme Court settled the question in the affirmative,[21] and the people have insisted on a constantly broadening exercise of that power. As a result of the addition of these expenditures to the more conventional expenditures of the government, it was found in the summer of 1948 that nearly 16 million people, or approximately one out of every six adults in the United States, were receiving government checks.[22] Other millions were benefiting in one way or another from the flow of federal funds. It is not contended that all the expenditures were wise. The point is that, by and large, the American people get from their government what they want from it. If they want the benefits which only government money can buy, they must expect high levels of government

20. Baltimore *Sun*, April 16, 1950.
21. *United States* v. *Butler*, 297 U.S. 1 (1936), *Helvering* v. *Davis*, 301 U.S. 619 (1937), and *Cleveland* v. *United States*, 323 U.S. 329 (1945).
22. *Washington Post*, August 14, 1948.

expenditure. In general, the people who demand government economy are the same people who demand in one way or another the expenditure of large sums of money to maintain the kind of regime in which they believe.

Balancing the Budget. Until recent years, apart from emergency periods, the American people have been accustomed to see each annual total of government expenditures balanced by at least an equal amount of income. A deficit was shown just before and during World War I, but thereafter the national debt was steadily reduced until the budget once more went out of balance in the fiscal year of 1931 in the midst of the depression period. It remained out of balance — that is, expenditure continued to exceed income — until the fiscal year 1947, when the continuation of most wartime taxes beyond the period of military hostilities brought once again an annual surplus, although in the face of a total national debt of between $250 and $260 billion. The fiscal year 1948 again brought a surplus, but the reduction of taxes provided for in that year brought further deficits in the ensuing years. The reduction in taxes, brought about by a Republican Congress, came partly as a result of political pressure from constituents, partly from a desire to make capital out of the reduction at the ensuing election, and partly as strategy for curtailing expenditures by a Democratic administration. The Democrats won the election, however, and neither they nor the Republicans could cut expenditures to the level of existing tax income. Congress could not be persuaded to the unpopular act of raising taxes. With a huge national debt hanging over it, and in a period of almost unprecedented peacetime business activity, the country returned to deficit spending.

In addition to the unpopularity of higher taxes and the popularity of heavy spending, newly prevailing economic theories, mentioned earlier, probably had their effect. As never before, government officials have become conscious of the relation of government activity to economic prosperity. They realize that a change in the tax level may make the difference between profits and optimism and continued business growth, on the one hand, and business deficits and contraction and depression on the other. They also know that government spending and the method of doing it may have similar effects. Unless prosperity is assured, therefore — and it is never assured absolutely — there are always some people who urge that spending be continued and perhaps increased, and that tax levels be kept down or perhaps reduced. There are supposed to be periods of prosperity in which taxing and spending are adjusted to recoup the losses of government in other periods, but those prosperous periods seem never to arrive. The theoretical position has been stated as follows by a congressional subcommittee:

> We recommend that the federal government employ a revenue-expenditure policy that will not only avoid aggravating instability but will actively contribute to the maintenance of general economic stability. A policy of balancing the budget annually despite fluctuations in production and employ-

> ment does not meet this test; such a policy, if actually followed, would magnify economic fluctuations. Only a fiscal policy that will yield a surplus of revenues over expenditures at high levels of national income and an excess of expenditures over revenues when there is a moderate amount of unemployment can at once avoid contributing to instability and make a positive contribution to stabilization.[23]

How difficult it is to make the theory work, however, is indicated by the following statement by a skeptical economist:

> When I first came to Washington, . . . the theory was that the budget should and must be balanced annually, and that was virtually unquestioned. Since then the view has been increasingly altered to a cyclical or compensatory budget with a rise in public expenditure and decline in taxes and creation of a deficit when business was down and the reverse when it was up. That was a very plausible theory and very persuasive to many of us.
>
> Now, what bothers me is that here the first time when the compensatory or cyclical theory has been put to a test it is discarded. This is an action that seems to validate the forebodings of many who said, "Yes, that is a very attractive theory, but it won't work because when the deficit appetite is sufficiently built up, deficits will recur and some other rationalization will be made for them." [24]

It seems probable that the major battles over the merits and demerits of balancing the federal budget annually remain to be fought over the years immediately ahead.

References

Charles C. Abbott, *Management of the Federal Debt* (McGraw-Hill, 1946).
Arthur E. Buck, *The Budget in Governments of Today* (Macmillan, 1934).
Edward R. Dewey and Edwin F. Dakin, *Cycles: The Science of Prediction* (Holt, 1947).
Alvin H. Hansen, *Economic Policy and Full Employment* (Whittlesey House, 1947).
Seymour E. Harris, *The New Economics, Keynes Influence on Theory and Public Policy* (Knopf, 1947).
R. Gordon Hayes, *Spending, Saving and Employment* (Knopf, 1948).
John Maynard Keynes, *The General Theory of Employment, Interest, and Money* (Harcourt, Brace, 1936).
Broadus Mitchell, *The Depression Decade* (Rinehart, 1947).
Estill E. Naylor, *The Federal Budget System in Operation* (Hayworth, 1941).
George Soule, *Prosperity Decade* (Rinehart, 1947).
Charles Warren, *Congress as Santa Claus* (Michie, 1932).

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23. *Monetary, Credit, and Fiscal Policies,* Senate Doc. No. 129, 81st Cong., 2d sess., p. 13.

24. Statement of Donald B. Woodward, economist with the Mutual Life Insurance Co. of New York, *January 1950 Report of the President,* Hearings, Joint Committee on the Economic Report, 81st Cong., 2d. sess., p. 162.

24

Money and Credit

Some of the broadest powers of the federal government are exercised through its control over money and credit. These powers extend all the way from regulating the metal content of coins to limiting the right of private business to sell on credit. They include regulation of our partly private and partly public banking system and the operation of government agencies to make loans not sound enough to be made by commercial banks. The purpose of this chapter is to supplement the two preceding ones on taxing and spending, and to provide background for later chapters on government controls over broad sectors of the American economy. Here we shall place money and credit in their setting with respect to the exercise of the power of "the positive state."

Money and credit are important for our purposes because they constitute a medium of exchange in our business economy, a medium without which our type of mass-production industrialism could not exist. They constitute the lifeblood, or at any rate the blood plasma, of our economic system. The problems connected with them are enormously intricate. The "man in the street" may think he knows what money is and may even attempt to define credit, but the trained economist may despair when asked for a definition unless he is given an opportunity to write a book in reply, a book which is likely to differ substantially from books written by his fellow economists. Since our concern is with government controls exercised by way of money and credit rather than with those subjects in themselves, it seems best to approach the subject by way of historical introduction.

HISTORICAL BACKGROUND

Constitutional Provisions. Article I, Section 8, of the Constitution gives Congress the power "to coin money, regulate the value thereof, and of foreign coins," and "to provide for the punishment of counterfeiting the securities and current coin of the United States." Congress was also authorized "to borrow money on the credit of the United States." By Section 10 of the same Article, the states are forbidden to "coin money; emit bills of credit, make any thing but gold and silver coin a tender in payment of

debts; pass any . . . law impairing the obligation of contracts." The framers of the Constitution looked to a currency consisting largely of precious metals, gold and silver, or of paper money guaranteed by reserves of gold and silver. The constitutional power to regulate the value of money did not involve the relatively modern theories of money such as the concept of the "commodity dollar." It was not, for example, based on a monetary theory such as that advanced by a minority during the New Deal period that the government should so regulate the quantity of paper money in circulation, in terms of the price index of important commodities, as to keep the purchasing power of the dollar relatively stable. The constitutional provision referred, rather, to fixing the quantity of precious metal in any coin which the government circulated as money. The federal plan was protected against state interference by forbidding the states to coin or print money.

The Circulatory Medium. For more than a century, although in a gradually declining percentage, gold and silver in coins and metal provided much of the circulatory medium. It was passed from hand to hand in individual transactions, it was transferred from bank to bank in the clearing of balances, and it was shipped from region to region as trade made necessary. During the first three-quarters of the nineteenth century, Congress attempted so to regulate the value of metal currency that gold dollars and silver dollars would be equally acceptable in payment for things of the same value. A stable ratio was somewhat hard to maintain because of such factors as the discovery of gold in one period and its consequent depreciation, and the discovery of new silver mines in other periods followed by similar depreciation of silver. Gold and silver interests each sought to bring about the maximum of coinage from its own metal. In spite of agitation from silver interests and from groups with inflationary sentiments, the extensive mining of silver, and other factors, resulted ultimately in the demonetization of silver and resort to the gold dollar as a monetary base.

Gold and silver coins provided only part of the circulatory medium. In addition, notes were issued by state and national banks and by the federal government. Coin is hard to handle in large quantities. Its shipment from place to place may be difficult and dangerous. Furthermore, there is not enough of it to provide an adequate circulatory medium. There is need, therefore, for supplemental currency in a more manageable form. At the time when the national monetary system was being established, there were, according to Alexander Hamilton, only three banks in operation in the entire United States, and no one of them, nor even all of them together, had sufficient resources or prestige to enable them to provide a paper currency which would circulate freely throughout the country. To provide such a currency and to provide also the credit needed for the expansion of business, Hamilton as Secretary of the Treasury urged the establishment of a national bank with branches to be located throughout the country. Congress chartered for a period of twenty years an institution known as the Bank

of the United States. It functioned from 1791 to 1811. Although the institution was largely private, part of the capital was subscribed by the United States and the federal government exercised some supervision. Like all banks for many decades, the bank operated with a reserve of precious metal. It made loans on sound security, though ordinarily not in coin but in the form of paper notes which it was authorized to issue and which were issued to be passed from hand to hand as monetary currency. People were willing to accept these notes in lieu of coin because of assurance that they could take the notes to the bank at any time and get coin for them. Because there was little actual demand for coin, the bank could safely issue far more money in the form of notes than could be redeemed in coin if all the notes were presented for redemption at the same time.

Rivalry Between State and National Banks. Although the notes of the Bank of the United States circulated widely, they were not issued in sufficient quantities or in sufficiently small denominations to meet all the needs for paper currency; nor did the national bank and its branches meet all the needs for business credit throughout the country. During the twenty-year life of the Bank of the United States, therefore, a large number of local banks were established under state jurisdiction. These also made loans and issued notes which circulated as money. Because each of these banks was essentially a local institution, its notes tended to circulate primarily in its own immediate vicinity where they could easily be presented for redemption in coin if doubts arose as to the solvency of the bank. When they circulated beyond that vicinity, they tended to depreciate; that is, if they were received as money, they were taken only at less than their face value. The notes of large banks in the larger cities tended to circulate farther and to depreciate less than the notes of small banks in small towns.

When the charter of the Bank of the United States expired in 1811, the state banks had grown so much in number and influence as to be able to prevent the renewal of the charter. They sought for themselves, in other words, the business which the Bank of the United States had previously conducted. These banks, unfortunately, which operated without any centralized supervision and without adequate supervision of any kind, proved unable to meet the financial strain of the War of 1812 and of the post-war period, and the services of a strong national bank were badly needed. In 1816 Congress chartered a new Bank of the United States for another period of twenty years. That bank exercised a kind of restraining influence over the several state banks even though it had no direct authority over them. The notes of the state banks circulating from hand to hand as money were, from time to time, paid in at the offices of the national bank. If the officers of that bank got the impression that a particular state bank was lending too much money in proportion to its metal reserves, it demanded that the state bank redeem its bank notes in coin instead of paying them out again as money. This kind of pressure forced the bank to contract its loans or, at any rate, to cease over-expansion. The pressure from the

national bank, therefore, might keep the state bank solvent, even though in so doing it curtailed the profits which the state bank derived from its loans.

McCulloch v. Maryland. The resentment of the state banks at the restrictive and competitive activities of the Bank of the United States resulted in attacks on the latter institution by the legislatures of a number of states. One of the branches of the Bank of the United States was located in Baltimore. Evidently to put the bank at a disadvantage, the Maryland legislature levied a tax on the notes of any bank or branch bank in Maryland which was not chartered by the legislature of the state. The tax initially levied was not prohibitively high, but it might have been raised to a prohibitive level at a later date had the right of the state to tax the bank been established. However, a case involving the constitutionality of the Maryland statute was carried to the Supreme Court where, in the name of *McCulloch v. Maryland*,[1] it resulted in one of the outstanding constitutional decisions of the Court.

In defending before the Supreme Court the power of the state to tax the bank, Maryland contended that Congress had no power to establish the bank since such a power was nowhere mentioned in the Constitution. In rejecting the contention, Chief Justice Marshall admitted that the federal government was one of enumerated powers, but he pointed out that the government, though limited in its powers, was supreme within its sphere of action. While he found among the enumerated powers none to establish a bank or create a corporation, he also found in the Constitution no prohibition of such an action, and he did find the power to lay and collect taxes, to borrow money, to regulate commerce, to declare and wage war, and to raise and support armies and navies. The powers given to the government, he argued, implied the ordinary means of execution. The Constitution authorized Congress to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof." To Marshall, seeking a broad base for congressional power, the words "necessary and proper" did not mean *absolutely* or *indispensably* necessary. If a particular instrument was fitting for the purpose at hand and if it was not forbidden by the Constitution, its use fell within the constitutional authorization. To quote Marshall's own generalization,

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.[2]

In this fashion, Marshall rationalized the power of Congress to charter a bank and confer upon it broad powers of its own. He then demonstrated that the operations of a federally chartered institution could not, consis-

1. 4 Wheaton 316 (1819).

2. *Ibid.*, p. 421.

tently with the Constitution, be impaired by the taxing measures of a state. This decision, together with others in the same period,[3] entrenched the Bank of the United States in its position of superiority over the state banks and, perhaps more important, provided the constitutional foundation for the national banking system of today.

Early Difficulties of National Banking. At the time of this decision in 1819, however, the establishment of an adequate national banking system was still a long way off. It was delayed partly by the lack of self-discipline and self-restraint in the men who thereafter operated the Bank of the United States. Nicholas Biddle, as president of the bank, demonstrated great skill at his task. He also showed a capacity for political ruthlessness, however, which brought him into conflict with the administration of Andrew Jackson. Although a fifth of the capital of the bank was subscribed by the United States and a fifth of the directors were appointed by it, Biddle attempted to use the resources of the institution to overthrow the Jackson administration and elect a Whig president in order to insure the renewal of the charter of his bank when its twenty year period expired. The merits of centralized banking, which were widely extolled by many economists, are not necessarily to be impugned because the leader of the central bank in the 1830's used his bank as an instrument of politics rather than primarily of finance. On the other hand, a banking instrument established by the federal government partly to meet its own needs is not justified in engaging in party strife merely because the idea of central banking is economically sound. In view of this involvement in politics, the Jackson administration and its successors for a number of terms were no doubt justified in refusing to renew the charter of the Bank of the United States or to replace it with another institution of the same kind.[4]

Nevertheless, this failure to maintain a federally chartered and regulated bank meant that from 1836 until the Civil War most of the paper money in circulation consisted of notes issued by state banks of varying soundness. The periodic depressions which forced these banks to close their doors and suspend specie payment — that is, refuse to redeem their notes in gold or silver — demonstrated the weakness of a banking system which rested upon diverse acts of state legislation. Federal borrowing through the issuing of United States notes which circulated as money did not greatly modify the situation. When the outbreak of the Civil War disrupted the business life of the country and suddenly created the need for very large amounts of currency to carry on the war, the state bank currency proved inadequate to the need. The state banks suspended specie payments and, in consequence, their notes already in circulation depreciated in varying amounts from their face value. The federal government faced the problem of financing a war without an adequate circulatory medium for either public

3. See particularly *Osborn* v. *Bank of the United States*, 9 Wheaton 734 (1824).
4. For discussion of the struggle with the Bank of the United States, see Carl B. Swisher, *Roger B. Taney* (New York: Macmillan, 1935), Chapters IX to XVI.

or private business. Indeed, the government was forced to suspend specie payments on its own treasury notes in order to prevent the loss of its own limited store of gold and silver.

"Irredeemable" Paper Money. To meet the financial crisis, Congress, on the reluctantly given advice of the Secretary of the Treasury, authorized the issue of a series of United States notes which carried no promise of redemption in specie. To insure their acceptance at their face value in payment of debts, Congress specifically required such acceptance; that is, it proclaimed them to be "legal tender."

The issuing of notes by the federal government which were not redeemable in specie — and the requirement that they be accepted in payment of debts — was regarded as dangerous at best and at the worst disastrous. History had demonstrated the intoxicating effects of the free printing of paper money and the possibilities of financial wreckage which it involved. A monetary system was to be trusted only when adequately backed by a substance of real value. Because the government was aware of the danger, it began, at the close of the war, to withdraw this series of notes, known from their color as "greenbacks," but ran immediately into political opposition because of the uncomfortable deflation which resulted. The amounts withdrawn were therefore reissued, and debtor groups and special interests which stood to profit thereby began to urge the issuing of substantial amounts of additional notes of the same kind.

Those who feared the coming of uncontrolled inflation fought to prevent any such expansion and attempted also to block it through the contention that the original issue of such notes as legal tender had been unauthorized by the Constitution. The Supreme Court was then headed by Salmon P. Chase, who at the time the legal tender acts had been passed was Secretary of the Treasury. By a bare majority the Court held that the Constitution did not authorize Congress to require acceptance of such notes in payment of debts which had been incurred before the legislation was enacted.[5] The Court at this time consisted of only seven members. Two new members were added and, in the midst of great excitement over the financial issue, the Court by a bare majority reversed its position, holding that as a war measure Congress had had the power to enact the legislation.[6]

Fortunately for the economic health of the country, the growth of anti-inflationary sentiment prevented further issuing of new greenbacks. Throughout the 1870's politicians wrangled over the ultimate withdrawal of the notes already in circulation. Withdrawal was finally provided for by payment in specie at the face value of the notes, but a parallel provision authorized the reissue of the notes in the same amounts. Their reissue as legal tender was again challenged, and this time the power of Congress to issue them was upheld, not on the basis of war power but of the several powers which bore in various ways on financial operations. Even yet, after

5. *Hepburn* v. *Griswold*, 8 Wallace 803 (1870).
6. *Knox* v. *Lee* and *Parker* v. *Davis*, 12 Wallace 457 (1871).

two decades of experience with greenbacks which, in spite of forebodings had not brought disaster, there was strong dissent by Justice Field:

> Never before was it contended by any jurist or commentator on the Constitution that the government, in receipt of ample income, with the Treasury overflowing, with more money on hand than it knows what to do with, could issue paper money as a legal tender. What was in 1862 called the "medicine of the Constitution" has now become its daily bread. So it always happens that whenever a wrong principle of conduct, political or personal, is adopted on a plea of necessity, it will be afterwards followed on a plea of convenience.[7]

The fact that disaster had not occurred did not, of course, prove Justice Field entirely wrong. The amount of notes unbacked by specie was not increased. Since the country was growing rapidly and adding greatly to its wealth, the amount of the "irredeemable" notes in proportion to the national wealth and to the amount of money in circulation gradually decreased. The potentialities of disaster were present, however, as they always are when a government begins to expand its paper currency.

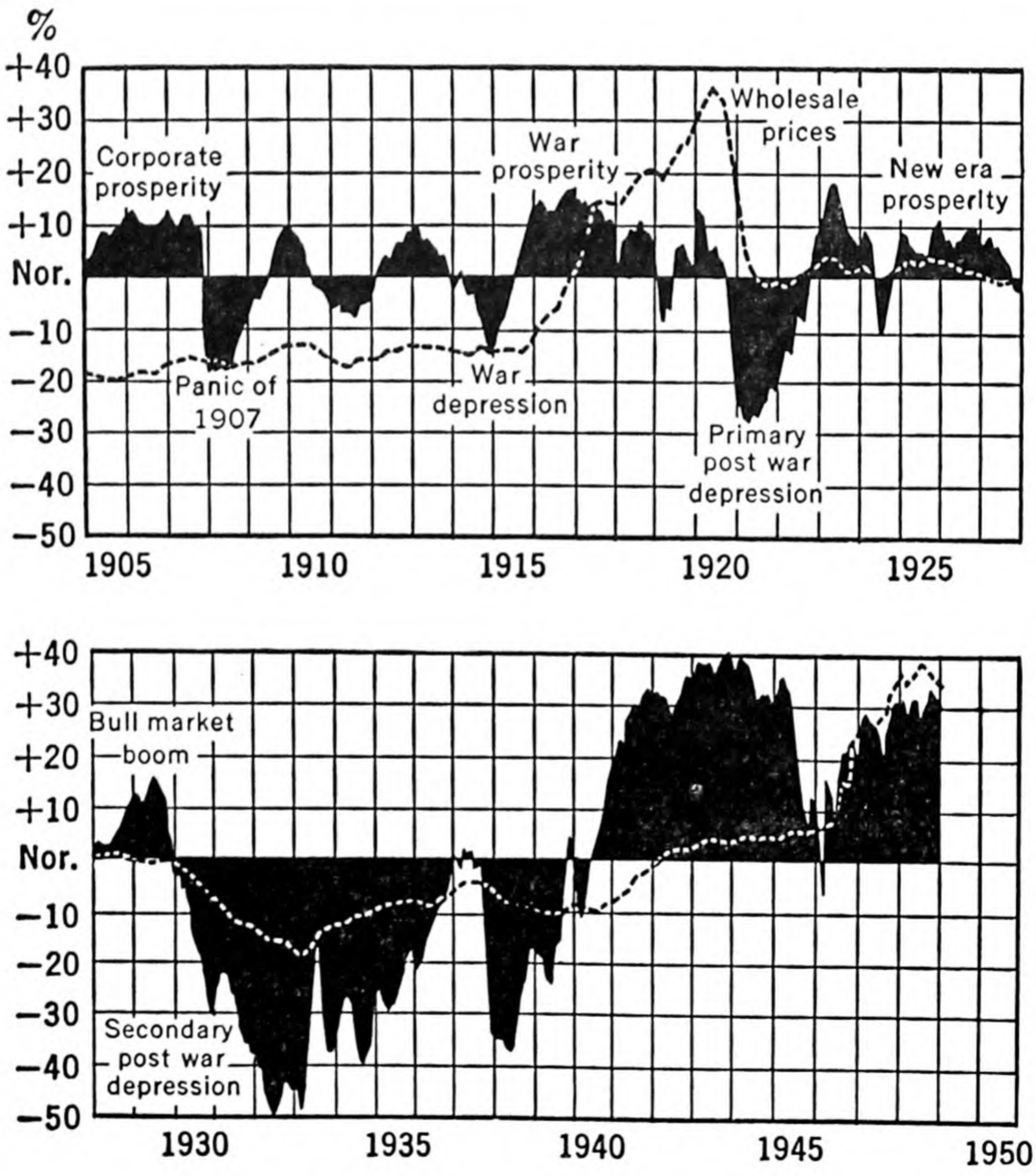
Establishment of a National Banking System. The issuing of greenbacks was only one of the devices planned during the Civil War to provide an adequate currency. Of ultimately far greater importance, the government also established a national banking system. Remembering the political struggles with the Bank of the United States during the administration of Andrew Jackson, it did not reestablish a central national bank but provided for the chartering of individual national banks all over the country under supervision of the federal government. Congress gave these national banks the power to issue notes which circulated as money, and then drove state bank notes out of competitive circulation by levying a prohibitive tax upon them. Once again the constitutionality of the assertion of federal power was challenged; and once again it was upheld.[8] The state banks were permitted to continue operations and to make loans as before. They therefore remained important in the credit structure of the country, but they were no longer able to issue notes which circulated as money. Some of those in operation when the national banking system was established secured federal charters, while others continued to operate under less stringent state laws.

The notes issued by the individual national banks circulated as money along with the United States notes previously mentioned and the gold and silver certificates issued by the federal government. Since the banks were required to deposit with the federal government an amount of money in United States bonds equivalent to the face value of the notes they issued, it was relatively safe even for people who knew nothing about the bank of issue to accept these notes. Even if the bank failed, redemption of the notes was guaranteed. Under such an arrangement, the issuing banks were deprived of much of the profit which banks in earlier years had been able

7. *Juilliard* v. *Greenman,* 110 U.S. 421 (1884).
8. *Veazie Bank* v. *Fenno,* 8 Wallace 533 (1869).

to make by paying out notes in excess of reserves. The profit now involved in issuing bank notes consisted principally of the interest on the United States bonds which the banks placed on deposit. Banks earned most of their profits not through issuing notes to circulate as money but through lending for interest money deposited with them.

Bank Credit. The loss of profit from issuing paper money unbacked by reserves of full value was less important than it would have been in earlier years because of changes which were gradually taking place in the banking business. The man who borrowed money from a bank during the early years usually received the amount of the loan, less interest or discount, in paper money. More recently, the borrower usually received his loan in the form of a credit on the books of the bank upon which he drew by checks. Less and less money passed from hand to hand in proportion to the total amount of business done. The deposit and checking system substituted a bookkeeping transaction for the use of money. The substitution, of course, has never become complete. The amount of money in circula-



PERIODS OF PROSPERITY AND DEPRESSION

(Courtesy of The Cleveland Trust Co.)

tion, indeed, has gradually increased, until in January, 1950, it was approximately $27 billion. The point is that it has declined in proportion to the total of so-called monetary transactions. Bank credit therefore became as important as money had been in earlier years.

With the growing importance of bank credit for the even prosperity of the country, the weakness of an uncoordinated banking system became more and more apparent. The banks tended to over-expand credit in times of prosperity when optimism was too great and when restraint was needed, and they contracted it too sharply in periods of depression when enterprise needed stimulation. For twenty years after the so-called panic of 1893, bankers and other businessmen and statesmen discussed proposals for changes in the banking system which would meet its inadequacies. Powerful banking interests fought against the idea of extensive government control, and non-banking interests and private citizens generally feared the centralization of banking power in private hands. Eventually, in 1913, Congress enacted the Federal Reserve Act, which worked out a compromise between centralization and anarchy and between government and private control. The system then established, with modifications from time to time as experience has required, still operates today. It is a system of privately owned though government-chartered banks, with a hierarchy of supervising banks culminating in a federal board at the peak of the system. A brief description of the system and its operations is necessary.

THE FEDERAL RESERVE SYSTEM

Organization. The Federal Reserve System consists of a Board of Governors, twelve Federal Reserve Banks, all the national banks in the country, and such state banks as choose to become members under prescribed conditions. The system as a whole is neither strictly governmental nor strictly private. The Board of Governors is a governmental agency. The twelve Federal Reserve Banks, located in the twelve Federal Reserve Districts into which the county is divided, are in part instruments for carrying out the policies of the Board of Governors and in part instruments for the more efficient operation of the district member banks, which in turn are as nearly private as a banking organization within a community can be permitted to be.

The Board of Governors, with headquarters in Washington, is expected to give a measure of direction in the once largely uncoordinated activities of our banking institutions. The seven members are appointed for fourteen-year terms by the President with the consent of the Senate. In selecting the members, the President is required to have due regard to a fair representation of financial, agricultural, industrial, and commercial interests and the geographical divisions of the country. No two members of the board may be selected from the same Federal Reserve District. Moreover, the terms of the members are staggered so that one begins every two years. This arrangement makes possible the conservation of acquired experience and a

continuity of administration which would not be possible if an extensive change in membership were made at any one time.

The twelve Federal Reserve Banks are located in Boston, New York, Philadelphia, Cleveland, Richmond, Atlanta, Chicago, St. Louis, Minneapolis, Kansas City, Dallas, and San Francisco. These banks do not ordinarily do business with private individuals or corporations as do the member banks, but only with the member banks themselves. The capital stock of each Reserve Bank is subscribed not by private individuals or by the government but by the member banks of the district. It is therefore in a real sense a "bankers' bank."

The board of directors of each Reserve Bank is composed of nine members equally divided into three classes. The first three directors represent the stockholding member banks; the second three are otherwise engaged in commerce, agriculture, or industry within the district. Both of these groups are elected by the stockholding member banks. The third group of directors is appointed directly by the Board of Governors of the Federal Reserve System. Each reserve bank operates under the direction of a president who is appointed for a term of five years by its board of directors with the approval of the Board of Governors.

Control of the Discount Rate. The conduct of the member banks is controlled in part by federal statutes dealing with the Federal Reserve System and in part by the Board of Governors, which derives its powers from the same statutes. For example, the legislation both limits directly, and authorizes the Board of Governors to limit, the amount of loans which a member bank can make on the basis of its own capital and the sums it has on deposit. Because the credit needs of a community expand and contract from time to time, the system provides for corresponding adjustments in the amounts which a member bank can lend. In a sense what happens is that, when a member bank exhausts the lending power which it derives from its capital and its deposits, it borrows from the Federal Reserve Bank of its district to enable it to make additional loans. What actually happens is a little less simple than that. When a member bank makes a loan at the prevailing rate of interest it takes security in the form of a mortgage or other evidence of value. The member bank, wishing to free itself for the making of still other loans, turns the note and the security over to the Reserve Bank, receiving from it the amount of money involved — or the amount of credit involved — less a discount which the Reserve Bank charges for its services. If the discount rate is low it will not seriously interfere with the lending process. If it is high, however, it is likely to discourage borrowing from the member bank, since the amount of the discount must be added to the normal interest which the member bank will charge the private borrower for the loan.

The discount rate therefore becomes a determining factor in shaping the flow of credit. If the Board of Governors of the Federal Reserve System finds that businessmen are over-borrowing and undue business expansion

is under way, it is expected to bring the situation back to normal by raising the discount rate. A high discount rate means a high interest rate, and a high interest rate is expected to discourage borrowing and reduce business activity. On the other hand if business seems depressed, the Board of Governors may order a reduction in the discount rate. This step will make it possible to reduce the interest rate charged to private borrowers. Reduction of the interest rate is expected to encourage business activity — on the assumption, of course, that its influence is not neutralized by other factors in the situation.

In periods when member banks must borrow extensively in order to make loans, this arrangement necessitates a great deal of business between them and the Reserve Banks. Much of this business is carried on as a matter of bookkeeping without actual interchange of currency. The currency exchanges which do take place are made with Federal Reserve notes, notes issued by the Reserve Banks to circulate as money. The member banks are no longer permitted to issue monetary notes as they once did, or as the national banks among them did, before the establishment of the Federal Reserve System.

Open Market Operations. In addition to control of credit through manipulation of the discount rate, the Federal Reserve System exercises similar power through what are called "open market operations." Although in varying and in partly controlled amounts, society always has a considerable store of credit available for business purposes. The important areas of investment include United States government bonds. If investment in government bonds is large, it tends to be lighter in other fields. On the other hand, if bonds are not available to provide an interest return, investment in private business is likely to expand.

The Federal Reserve System is authorized to regulate the flow of credit by buying or selling bonds and other securities, depending on whether it seems desirable to draw investment funds away from business or to let them be used for business expansion. If investment in private enterprise seems to be over-expanding, the Reserve Banks will be directed to sell securities in order to absorb some of the excess funds. On the other hand if business seems to need stimulation, the Reserve Banks will buy securities in the hope of crowding private investment funds out into business.

Control of Deposit Reserves. The Board of Governors of the Federal Reserve System has power through still another device over the amount of lending which member banks can do. Within limits it controls the amount of reserves which banks must retain in cash against their deposits. The smaller the reserves they are required to maintain, the more lending they can do. For example,

> When the reserves required against deposits average 10 percent, the banking system can create and have outstanding deposits equal to ten times the volume of its reserves, but when the reserves required against deposits

> average 20 percent the banking system can create and have outstanding deposits equal to only 5 times the volume of its reserve.[9]

The Federal Reserve System regulates somewhat the flow of credit by the expedient of adjusting the reserve figure upward or downward as the credit needs of the country seem to require.

To run ahead of the story, of the three regulatory devices — manipulation of the discount rate, open market operations, and control of deposit reserves — the first was regarded as of major importance during the early years of the Federal Reserve System. In recent years, however, member banks have had to do relatively little borrowing from the Reserve Banks, so that the adjustment of the discount rate has exerted little more than a kind of psychological control. The situation is subject to change, however, and this type of control may again become important. The most extensively used instrument now is open market operations, with adjustment of deposit reserves playing an occasional part.

Effects of Federal Reserve Control. The mechanisms and the considerations involved in manipulating the discount rate and in open market operations are exceedingly complicated. While undoubtedly some of the chaos has been taken out of our monetary and credit system by the operations of Federal Reserve machinery, so many uncontrolled factors are involved that cause and effect are hard to predict accurately and often hard to appraise even on a backward view. The newly established Federal Reserve System was credited with greatly facilitating the financing of World War I and with making it possible for the country to go through the war crisis without suspending specie payments; yet the system did not prevent the business collapse of 1929. In that year the discount rate was reluctantly and belatedly raised to curb excessive expansion, but without the desired results. There was no adequate mechanism for distinguishing between the credit which was going into genuinely productive and desirable enterprise and that which was going into undesirable speculation. While the frantic speculation of the period caused great uneasiness among thoughtful people, it was widely believed that legitimate business was not overexpanded and that raising the discount rate would depress business more than it would discourage speculation. It was thought that business might thereby be driven off the permanent plateau of prosperity which President Hoover and others envisaged for it. The situation was further complicated by the fact that largely unpredictable foreign events had a great deal to do with the flow of American goods out of the country and therefore with the operation of supply and demand at home.

If raising the discount rate provided no feasible method of preventing the collapse of 1929, reducing it likewise failed to lift the country out of the trough of the depression. Whatever the rate of discount, the planning of the Federal Reserve System envisaged the making of only such loans as

9. *Monetary, Credit, and Fiscal Policies,* Senate Doc. No. 129, 81st Cong., 2d sess., p. 20.

were economically sound. The depression disclosed so much unsoundness in the business structure and produced so much more unsoundness that large-scale lending on a firm financial basis had to be restricted, whatever the interest rate. The federal government itself found it necessary to extend credit at various points, not primarily to make a profit or even to lend at cost, but to prevent even greater disaster to the economic and social order. Various government agencies made loans to keep railroad owners, farm owners, home owners, and others out of bankruptcy, loans which no conservative banker would have classified as sound risks. The established machinery of the Federal Reserve System, unable to serve effectively, idled along in the performance of routine duties while other agencies dealt with the more serious aspects of the crisis. The government found it necessary to accept suspension of specie payments by the banking system, to call in the entire monetary gold supply and retain possession of it except as it was used in foreign exchange, and to reduce by approximately forty percent the nominal gold value of the dollar.[10] These expedients, although their separate results are hard to trace, so overshadowed Federal Reserve manipulation of the discount rate as to render the latter an item of little relative importance.

The actual effects of open market operations have likewise been hard to measure. The conditions under which they would operate as a completely satisfactory instrument of control seem never to arrive. In 1948 those in authority were torn between measures which would curtail the inflationary spiral and others which would make it possible to continue financing the high national debt at a low rate of interest. From the point of view of curbing inflation, it seemed apparent not only that the discount rate should be raised to increase the cost of private borrowing but also that the Federal Reserve System ought to sell government bonds in order to absorb some of the available credit. On the other hand, it was clear that extensive sale of government bonds would depress their market value and would mean that future borrowing by the government would have to be done at substantially higher interest rates. In order to prevent such depreciation, the Treasury Department had committed itself to a policy not of selling but of buying bonds in sufficient quantities to maintain market prices at a level somewhere above their face value. The dilemma involved in attempting to raise interest rates generally to curb inflation, and at the same time attempting to maintain the value of government bonds issued at low interest rates, meant that only short and tentative steps could be taken in any direction. Although jurisdiction in such matters is supposed to rest largely with the Federal Reserve System, it is apparent that the Treasury Department plays an important part in major decisions.

Successful operation of credit control through the Federal Reserve System involves an assumption that there is for any period a proper level at which

10. For important Supreme Court decisions dealing with these problems see *Norman* v. *Baltimore and Ohio Railroad Co.*, 294 U.S. 240 (1935), and *Perry* v. *United States*, 294 U.S. 330 (1935). The decisions, although by a closely divided Court, recognized broad power of the federal government in handling problems of money and credit.

business should operate. If the assumption is correct, the appropriate level is determined by so many factors that it is often undiscoverable until some time well in the future. The proper level of operations midway through the twentieth century is vitally affected by the amount of American expenditures in foreign countries and the amount of exports of American goods. Yet the uncertainties in those fields are so great that it is virtually impossible to see the course of events for very far ahead. Business is likewise vitally affected by the amount to be spent and by the subject matter of the spending for national defense or war. Yet to maintain adequate flexibility in plans for defense and war requires enormous flexibility of program in this field. A system of credit control must be subject to all the diverse factors which operate in these and other fields of action.

Insurance of Bank Deposits. The threatened collapse of the entire banking system and the actual collapse of many banks during the depression of the early 1930's did much to shake the confidence of the American people in a system which they had come to regard as fundamentally sound. During the earlier decades of the twentieth century, a number of states had protected depositors in state banks by requiring the insurance of those deposits. To make the protection of small deposits nearly universal, Congress authorized the establishment of the Federal Deposit Insurance Corporation. That corporation, levying assessments on the banks involved, insures deposits in full up to the amount of $5,000 in banks which are members of the Federal Reserve System and in others which participate pursuant to prescribed regulations.

The insurance of deposits no doubt creates a sense of safety in depositors which takes the place of the confidence in individual institutions for which banks in times past were accustomed to compete. Elimination of such competition among banks, however, has tended to encourage the levying and expansion of charges for the servicing of smaller checking accounts.

GOVERNMENT LENDING

As the federal government systematized the currency and extended its control over the banking system, it inevitably impinged more and more upon the credit structure. Until the 1910's, however, it regulated or provided credit for private enterprise primarily through its power over money and through regulation of a largely private banking system. Then gradually it began to operate directly as a credit agency through corporations of its own creation. It now operates on a large scale as a lending agency or as a sponsor of public lending agencies in many fields, making some loans which would not be made by commercial banks and others which probably compete directly or indirectly with them. Through its lending agencies it exercises part of the control over the economy which it has been only moderately successful in exercising through the Federal Reserve System. Its first large-

scale lending was to provide better credit facilities for farmers than commercial banks provided.

Farm Credit. Although commercial banks have always made some loans to farmers, their methods are better adapted to meeting the needs of business generally than of agriculture. Farmers often need long term mortgage loans. Such loans are often hard to get from banks which must maintain high liquidity of capital. Farmers also need to be able to borrow for short periods against growing crops, but this type of security is not the most satisfactory to commercial banks. Again, because of the seasonal character of agriculture, the credit needs of agricultural regions may be so highly seasonal that they cannot be fully met by commercial banks. To meet these needs, the federal government has established a series of credit institutions which, in their present form, are brought together in the Farm Credit Administration, an agency of the Department of Agriculture.

The several units of the Farm Credit Administration provide as fully as possible the various kinds of agricultural credit which are needed. Credit policy, whether it is to expand or contract agricultural production, is integrated with the broader program of the Department of Agriculture and of the administration of the President. Among other things, it is coordinated with the price support policy whereby the government buys up agricultural surpluses in order to maintain prices of particular commodities at certain levels.[11]

Government Credit for Business. Through the War Finance Corporation the federal government first provided large scale credit aid for business during World War I. The value of its temporary services was remembered during the administration of Herbert Hoover after the business collapse of 1929 when banks, railroads, and other business organizations were unable to get desperately needed help from private sources. In 1932 the government established the Reconstruction Finance Corporation to meet the business need. The RFC is still in operation on a large scale. Plans of the New Deal administration to wind up its affairs after the country had climbed out of the depression were abandoned when its services were needed again during the recession of 1937. In 1948 a Republican Congress, heeding the protest of bankers and others that the RFC was competing with private enterprise, reduced its capital stock from $500 million to $100 million, apparently with the idea of reducing it to little more than a standby agency for use in some future crisis. It remained in good standing, however, as Democrats returned to power in the election of 1948 and again sponsored widespread public lending programs. The Hoover Commission, with some dissenting votes, recommended transferring the RFC from its position as an independent agency to the jurisdiction of the Treasury Department, that its normal lending powers be wiped out, and that it "be organized to guar-

11. See Report of the Hoover Commission, *Federal Business Enterprises,* House Doc. No. 152, 81st Cong., 1st sess., pp. 34–42.

antee loans by commercial banks." [12] President Truman, however, showed no inclination to convert this powerful public lending agency into a mere instrument to insure commercial banks against business losses.

The RFC has rendered important service to the country not only in helping business institutions through temporary crises but also by large scale lending for war production and for carrying out foreign spending programs. It has been authorized to create and operate subsidiary corporations for various special purposes. It has operated at times as if it were a kind of government all in itself.

Because of the enormous power it wields through the making of loans it is viewed with uneasiness and suspicion, like many other agencies in the executive branch. This lending power is often used by the executive branch of the government to facilitate operations which, without it, would require more in the way of legislation and acts of appropriation by Congress. In other words, it becomes an instrument for the expansion of executive power in its competition with Congress. The exercise of financial power, furthermore, while giving aid to enterprise at certain points, inevitably antagonizes business competitors, financial institutions which do not like to see the expansion of federal lending power, and businessmen and institutions which are denied the aid they seek. So it is that the RFC is required from time to time to undergo reinspection as Congress debates the question of continuing its existence and of determining the limits of its powers. Although the RFC is so well entrenched that its abolition is extremely improbable unless by substituting some other agency to perform similar functions, its functions and activities are likely to undergo frequent and perhaps sweeping changes along with changes in business and politics.

Lending for Foreign Trade. Although the Reconstruction Finance Corporation deals largely with business enterprise inside the United States, Congress expanded its activities toward the foreign field in the Foreign Assistance Act of 1948 by directing it to make advances up to $1 billion in aid to western European countries through the Economic Cooperation Administration. The head of the ECA was directed to use another government lending agency, the Export-Import Bank of Washington, for making expenditures. The Export-Import Bank was established during the depression period and was made a permanent independent agency by act of Congress in 1945. The purpose of the bank is in general to facilitate the exports and imports of the United States. Its management is vested in a bipartisan board of directors consisting of the Secretary of State and four full-time members appointed by the President by and with the advice and consent of the Senate.

Government Lending Generally. Whether for domestic purposes or to promote foreign trade or improve foreign relations, government lending seems to be on the increase. It is true that domestic private lending agencies

12. *Ibid.*, p. 43.

appear to be increasingly resentful of federal intervention, and private producers who suffer competition from government-financed business are growing increasingly vociferous and perhaps increasingly effective in their opposition. An example lies in the field of housing. Through various agencies, the federal government found it necessary to make or insure loans in large quantities during and after the depression, both to protect home owners against loss of their homes and to facilitate adequate home building. Private real estate interests gradually developed such strength as to be able greatly to curtail new program in this field. The Housing and Home Finance Agency, however, still does considerable credit business in housing. Aid to veterans and the 1950 statute to promote low cost housing brought expansion of the program.

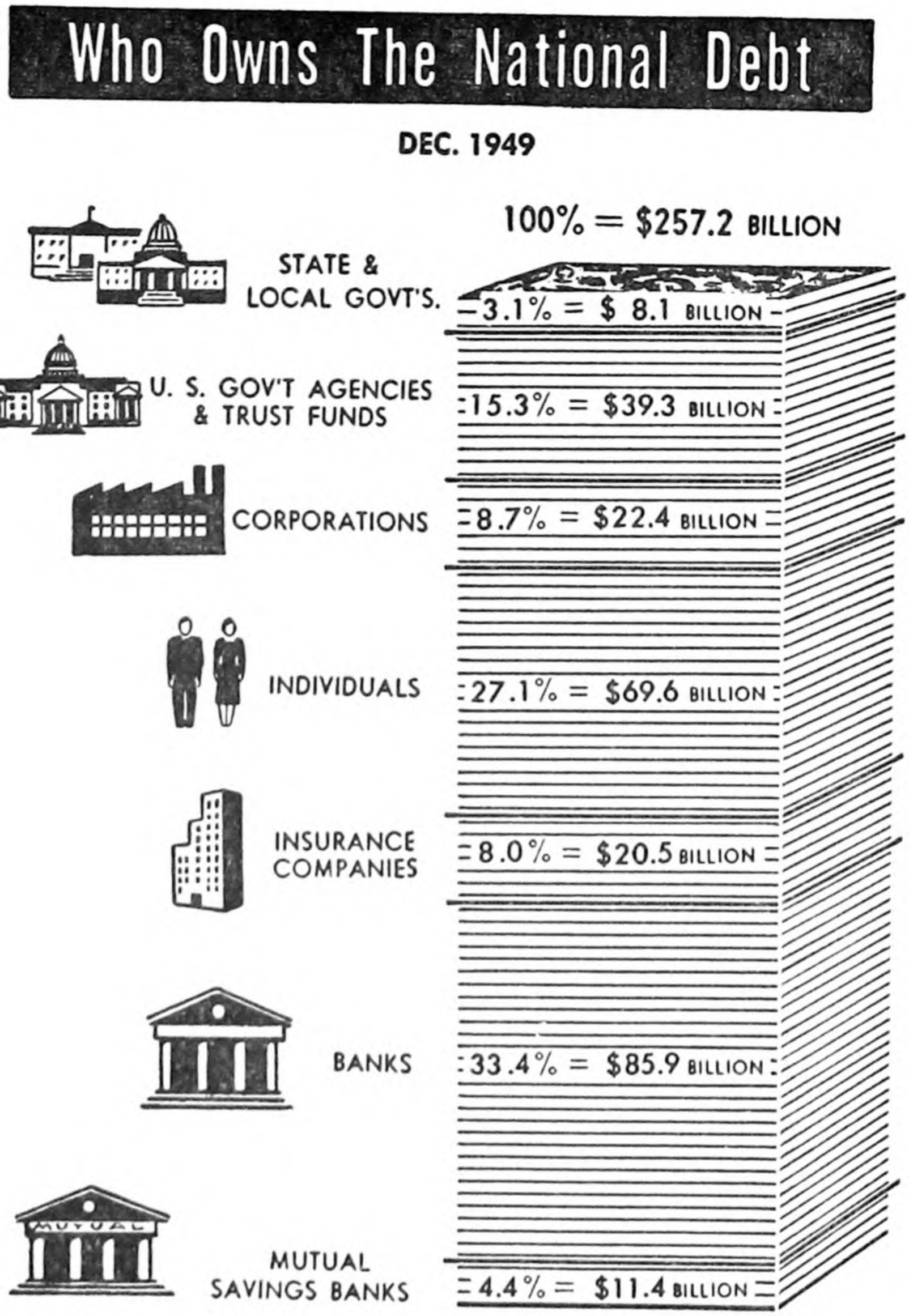
In spite of the protests of private competitors, as already indicated, the national welfare often requires the promotion of enterprises which do not initially seem good risks of the kind which private financial institutions would be justified in undertaking. This happens in depressions, in time of war, and in situations where the lavish use of American money seems in the long run the least expensive way to maintain a desired position in international affairs. Once the lending machinery is established, the tendency is to continue public lending whether or not there is a critical need for it.

AREAS OF INVESTMENT

Government Securities. Public and private debt represent vast areas of investment. The gross debt of the federal government alone amounted during the early 1950's to between $250 and $260 billion.[13] The gross debt of state and local governments, including not only conventional municipalities but also counties, school districts, irrigation districts, water districts, and other governmental agencies, has ranged for several years between $15 and $20 billion. Investments in varying amounts have been made in the securities of foreign countries. These several areas absorb private savings and accumulations of funds made by banks, insurance companies, and other corporations.

In wartime the federal government uses various controls to prevent investment in private business which might compete with the war effort, and by direct and indirect efforts it channels great quantities of individual and corporate reserve funds into the purchase of government bonds. People and corporations buy government bonds because of patriotism, because of social pressures, because government employers and contractors for the government withhold percentages of salaries and wages for the purchase of bonds, and because there are few other satisfactory fields of investment open. In peacetime, federal bonds are bought because of the investment security they offer rather than because of any particularly high rate of return. State and local bonds, if sometimes regarded as less safe than federal bonds, are desirable because income from them is not taxed by the federal govern-

13. *Statistical Abstract of the United States,* 1949, p. 380.



ment. Although it is no longer regarded as certain that a federal tax on such income would be unconstitutional, local governments have succeeded thus far in preventing the collection of such a tax.

Non-Governmental Securities. Also important as an area of investment are the bonds issued by private corporations, though government exercised little control over the issuing of such bonds until the period of the depression of the 1930's. Toward the end of 1949 the total market value of all private bonds listed on the New York Stock Exchange was more than $132 billion.[14] Listed on the same exchange were shares of stock with a market value of more than $73 billion.[15] In addition, considerable amounts in stocks and bonds were marketed through other exchanges or without listing on

14. *Survey of Current Business*, January, 1950, pp. 5–19.
15. *Ibid.*, pp. 5–20.

any exchange. To investors, the difference between stocks and bonds is less than is generally assumed. While bonds are usually purchased for the guaranteed interest return, stocks are purchased sometimes for dividends and sometimes for profits anticipated from resale. The buying and selling of stocks represented, for example, by the operations of the New York Stock Exchange constitutes an enormous business and may run daily into millions of dollars. Buying and selling of stocks may continue day after day with little impact upon the businesses whose shares are passed from hand to hand at rising or declining prices. It is the speculator rather than the corporation who wins or loses.

More important than the daily flow is the initial flotation of new issues. Large corporations usually resort to what are called investment banking houses for the initial sale of new stock. This process involves the welfare both of the issuing corporation and the buying public. The marketing of new securities has developed into an important business in itself. Disclosures of the depression period of the early 1930's demonstrated that persuasive salesmen had foisted upon credulous investors billions of dollars in usually beautifully engraved securities which represented little actual value. Sporadic and inadequate state legislation had failed to prevent gross misrepresentation and fraud. Important enactments of the New Deal period included the Securities Act of 1933 and the Securities and Exchange Act of 1934, which require the filing of detailed information about prospective issues with a government agency, now the Securities and Exchange Commission, wherever the facilities of interstate commerce or the United States mail are used in connection with the sale. Investment banking, furthermore, has been divorced from the activities of commercial banking, to give more adequate protection to all the interests involved.

Market speculation takes place not only in the stocks of corporations but also in basic commodities. In the commodity markets, for example, men buy and sell grain without any expectation of delivery but merely in the hope of making a profit on the transaction. Here the welfare of both consumers and producing farmers is so intimately involved that the federal government has found it necessary to control exchanges in various ways and, among other things, to restrict the sale of grain futures for speculative purposes.

Insurance. Billions of dollars in liquid wealth are tied up in or pass through the offices of insurance companies. Insurance is a technique of sharing and thereby of reducing for each individual the economic risks involved in loss of life, property, or means of earning a livelihood. Regulation of insurance has until recently been largely in the hands of the several states. A Supreme Court decision handed down in 1869, before the network of insurance business across state lines became highly important, held that the making of insurance contracts across state lines did not constitute interstate commerce — an area of commerce with which the individual states had no power to interfere.[16] A series of later decisions likewise held that insur-

16. *Paul* v. *Virginia,* 8 Wallace 168 (1869).

ance operations across state lines were not interstate commerce. In 1944, however, in effect recognizing the changed character of the business and the need or possible need for centralized supervision, the Supreme Court changed its position and held that insurance business across state lines had aspects which could be regulated as interstate commerce.[17] The way is now open for the exercise of federal power other than through anti-trust legislation, which was involved in that case, but Congress has not yet undertaken broad regulation. Thus far, indeed, the important activity of the federal government in connection with insurance has been that of insurer, under the social security system and for members and veterans of the armed services.

The activities of insurance companies deeply involve the intricate problems of inflation and deflation with which the federal government is expected to cope. In normal times, insurance companies invest heavily in railroads, public utilities, and other presumably sound private investments. The income from these investments determines in part their rates of insurance. During the depression, the insurance companies found it increasingly difficult to discover sound investments with high returns. During World War II when much of the nation's business was channeled into government operations, insurance companies invested many billions in government securities, even though such securities at that time paid a relatively low rate of interest. Gradually thereafter, companies shifted part of their investment from government bonds into private investment where the return was higher.

Commercial Credit. In order to reduce competitive bidding for goods in short supply, the federal government during World War II placed drastic restrictions on the selling of goods on credit. The pressure of businesses eager to sell more goods than the people had money to buy, however, brought the elimination of these restrictions after the close of the war. This in turn brought a vast temporary increase in purchasing power, which aggravated the tendency toward inflation which characterized the post-war period. Although banks, stock exchanges, and other commercial interests opposed the restoration of government restrictions on credit sales, Congress in 1948 reluctantly reimposed some of the restrictions. They were relaxed gradually thereafter as people became more concerned about a decline in business and less so about inflation, and authority to exercise such control was permitted to expire. Restrictions were imposed again in the latter part of 1950 as government military buying created a scarcity of goods and raised prices. Credit control operates with other controls to preserve economic order. The Federal Reserve System continues to regulate stock-market margins. That is, it regulates the percentage of borrowing in connection with the purchase of stock exchange securities. For a time after the close of World War II it required payment of 100 percent of the value of the stock purchased, thereby discouraging stock speculation. By a series of reductions the cash requirement was brought down to 50 percent.

17. *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944).

APPRAISAL

The materials of this chapter illustrate the point made at the beginning, that the problems of currency and credit are so intricate and so involved with all aspects of the economic life of the country that adequate comprehension even by experts is extremely difficult to achieve. The subject includes maintenance of a sound currency, of an adequate deposit and checking system, and of a flexible lending system; governmental supervision of banking institutions, and governmental maintenance of credit facilities for use where private lending is not feasible; supervision of the sales of private securities and of insurance in relation to investments; regulation of commercial credit, and various related items. The official or the agency that would attempt to solve currency and credit problems must operate like the physician who in treating one ailment must watch for the effect of his medicine on other bodily conditions. There are no specifics for the purification of the economic bloodstream. Necessary measures must be taken cautiously while watching for unmeasured impact in unexpected quarters.

The trend in currency and credit policy in the United States has been toward increased federal control. A congressional subcommittee has recently stated that

> In many ways, but especially through the monetary and debt-management policies of the Federal Reserve and the Treasury, the Federal Government determines the total supply and cost of money for both private and public spending. Ours is and has been for a long time a partially managed monetary system, and the Government cannot escape responsibility for its behavior.[18]

All currency, including bank note currency, has been brought under federal control. The banking system, although still privately owned and still privately managed at the offices of individual banks, is being drawn together more and more into a system for unitary operation. In addition to the power which it wields through supervision of the national debt, the federal government is gradually reaching out to supervise the management of private debt. Bankruptcy, a subject not here independently discussed, operates under federal supervision to liquidate the assets of individuals and corporations unable to pay their bills. Bankruptcy powers have been extended to the composition or scaling down of debts to amounts which are reasonably within the range of settlement if perchance it is not feasible to sell a railroad or a gigantic plant or whatever form of property may be involved. The right to extend credit in various fields, to sell "on time," has been brought under federal restriction.

Yet, to repeat, the federal government has not found a way to exercise all these powers symmetrically in such a way as to maintain the desired economic stability. Various solutions for managing the currency and con-

18. *Monetary, Credit, and Fiscal Policies,* Senate Doc. No. 129, 81st Cong., 2d sess., p. 6.

trolling credit are offered from time to time, but as a rule they prove to be little more than panaceas thought up by men who have failed to envisage all the interrelated problems. The problems are inseparable from those of raising the government's own revenue and from the scope and nature of government spending. Government cannot escape the problems, therefore, even if it has little hope of bringing them to an ultimate solution.

The problems are not constitutional in the negative sense of the term; that is, the federal government is not stopped from coping with them because of constitutional limitations. The Supreme Court has upheld the power of the federal government to issue paper money and to make it legal tender in payment of debts quite apart from any reserve of precious metal. It has upheld the power of the government to withdraw gold entirely from circulation. It has upheld the power of changing the nominal gold value of the dollar. It has sanctioned widespread government spending for the public welfare, and it has raised no barriers to the development of gigantic credit agencies within the government itself. It has sanctioned such regulations of the banking system as the government has seen fit to adopt, as well as widespread regulations of other agencies having to do in one way or another with credit problems. Obstructions to achievement, therefore, lie not in the constitutional system but in the intricacy and difficulty of the task.

References

George L. Bach, *Federal Reserve Policy Making* (Knopf, 1950).
Ralph C. H. Catterall, *The Second Bank of the United States* (University of Chicago Press, 1903).
Arthur W. Crawford, *Monetary Management under the New Deal* (American Council on Public Affairs, 1940).
The Federal Reserve System; Its Purposes and Function (Federal Reserve System, 2d. ed., 1947).
William J. Fellner, *Monetary Policies and Full Employment* (University of California Press, 2d. ed., 1947).
Theodor E. Gregory, *The Gold Standard and its Future* (Dutton, 3d. ed. 1935).
Seymour E. Harris, *Twenty Years of Federal Reserve Policy* (Harvard University Press, 2 vols., 1933).
E. W. Kemmerer, *The A. B. C. of the Federal Reserve System* (Princeton University Press, 10th ed., 1936).
———, *Gold and the Gold Standard* (McGraw-Hill, 1944).
John McDiarmid, *Government Corporations and Federal Funds* (University of Chicago Press, 1938).
H. G. Moulton, *Controlling Factors in Economic Development* (Brookings, 1949).
———, *The New Philosophy of Public Debt* (Brookings, 1943).
Carl B. Swisher, *Roger B. Taney* (Macmillan, 1935).
Paul M. Warburg, *The Federal Reserve System, Its Origin and Growth* (Macmillan, 1930).
Rudolph L. Weissman, *The New Federal Reserve System* (Harpers, 1936).
William O. Weyforth, *The Federal Reserve Board; a Study of Federal Reserve Structure and Credit Control* (Johns Hopkins Press, 1933).

PART SIX ★ *Areas of Internal Control*

25

Functions of the Positive State

"The day of the positive state is upon us," wrote Pendleton Herring in 1941, in a volume entitled *The Impact of War.* Our acceptance of the positive state, he contended, was not a matter of choice. "In a world of positive states, negative governments are at a fatal disadvantage. Hence, both from internal desire and external compulsion, the federal government extends and consolidates its powers, continually assumes more responsibilities, and undertakes new functions." [1] In somewhat different terms, we dealt briefly with this point in the early chapters of this book. By way of explaining the point of view and purpose of the current study, we discussed the sphere of government in the United States, the changing character of governmental functions, and the relations of government as an instrument of control to nominally non-governmental concentrations of regulatory power such as the family, the church, the school, the corporation, and the labor union. That discussion could be only introductory. Its purpose was to show the importance of the study of the theory and practice of American government, to give to readers a sense of worthwhileness in analyzing the structure and operations of government as we have done in the preceding chapters. Now, as we begin to portray the exercise of governmental power in various important fields, it is necessary to return to the broad subject of the sphere of American government for further discussion of the character of the functions which the "positive state" performs.

THE TOTALITY OF IMPACT

In later chapters in this section we shall be discussing various aspects of government relations to industry, to business generally, to agriculture, and to labor. Here our concern is not primarily with details but with the total impact of government on the life of our country. We know that there is great diversity among the things which government does and among the

1. Pendleton Herring, *The Impact of War* (New York: Farrar, 1941), p. 22. Although the term "positive state" is not defined, the author is obviously using it to distinguish between modern governments which take responsibility for promoting the welfare of the people in widely varied fields and "negative" governments which are responsible merely for preservation of a minimum of law and order.

fields in which it operates. What government does at one point may seem and actually may be inconsistent with what it does at other points. There is vast confusion and lack of coordination, and the fact that government is but one of many instruments of control — with corporations and labor unions and powerful lobbies offering formidable opposition and compelling modifications of strategy — makes the pattern of government harder to discover than it would be if it had a monopoly of power. Yet, in spite of the fact that government activities range all the way from punishing crime to subsidizing agricultural production, from investigating the nature of plant life to waging war, from educating children to protecting the right of collective bargaining, there must be a kind of total impact upon society. Conflicts must eventually cancel out, and inconsistencies and irrelevancies must add up to a "dimensional something" in relation to our economy and our culture as a whole. Before differentiating the broad fields of regulation for separate analysis, therefore, we shall here stress this totality of impact and restate some of its component parts.

Control of Income. Part of the synthesis of this chapter must be in the form of summary of points made earlier and part in brief anticipation of chapters still ahead, along with a measure of material not elsewhere presented. Thus we have already stressed the fact that the federal government increasingly controls the distribution of income. Although personal incomes in dollars after tax deductions increased nearly two and a half times between 1928 and 1948, and the number of people with incomes of more than $25,000 increased more than 60 percent, the total income above $25,000 which was left after taxes declined by about one sixth.[2] In other words, the total amount of high income was being reduced in the face of the general increase in dollar income. The country was losing both the advantages and the disadvantages of having great accumulations of wealth in a few hands. Increasingly the taxing power was being used to distribute wealth currently, as against the earlier practice of permitting wealthy people to distribute it through purchasing power or through gifts.

Inequalities in the distribution of income in the upper brackets are tending to disappear, making improbable the development of huge fortunes in the future of the kind through which a few men and families have gained great power within the economy. Such power is being curtailed, and so also is the power to make lavish gifts and to establish foundations for service to the public welfare such as those established by the Rockefellers, Carnegies, and Guggenheims. The government redistributes the wealth, and, by implication, assumes responsibility for providing the services which private wealth can no longer provide. Yet not too much should be said about redistribution of income. Although high incomes have been drastically reduced, the problem of excessively low incomes still remains. As of 1948 we had some 6.3 million non-farm families with annual incomes of less

2. *Sumner H. Slichter,* "Affirmation of Faith in Our Economy," *New York Times Magazine,* March 26, 1950, p. 9.

than $2,000;[3] to provide a somewhat comparable farm figure, 45.6 percent of our farms in 1944 had income in products amounting to less than $1,230.[4] It appeared, therefore, that "about one-third of all the families and individuals in the United States had total money incomes of less than $2,000 in 1948." [5] Government attempts to raise low incomes, which in the nature of things must be very different from corresponding attempts to redistribute high ones, will be discussed under other headings.

Control of Prices. The federal government, along with state governments in many fields, attempts to keep the economy in balance by fixing prices or by fixing their upward or downward limits. Various public utility prices, or rates, have long been fixed to protect the public against extortion through monopoly control. The maximum prices of most necessities were fixed during World War II to protect consumers and also to prevent the chaos of sweeping price changes which might otherwise have come about as a result of shortages of goods and the increased purchasing power of people who had unusually profitable employment. Minimum prices are fixed in various fields, and particularly in agriculture, to maintain the economic well-being of producers. Such prices were fixed in the coal industry during the New Deal period, and some coal interests would like to see the practice reestablished. It may be only a matter of time before industry generally, citing the importance of its own stability and prosperity to the welfare of the country generally, will demand government support for the maintenance of its prices wherever competition operates to keep prices down. Whether amounts paid to producers are fixed by the payment of government subsidies or by outright price-fixing, the public pays the cost as the price of economic stability. In one instance it pays through taxes; in the other, through consumer prices. This is true also for wages, whether they are maintained by the establishment of minimum wage levels, as when the Fair Labor Standards Act fixes a minimum wage of seventy-five cents an hour, or by protecting the right of labor to bargain collectively with employers on wages. Stability is prescribed for the good of society, and society pays the bill. The costs of the various kinds of stability, including both wages and prices, runs to billions of dollars. This is not to say that the alternative chaos would not cost far more in both direct monetary figures and in attendant social losses, but merely that the costs are tremendous and that in the process of incurring them we fundamentally modify the character of our economic system.

As yet, it is true, most prices above some minimum level and all prices in some fields are fixed not by government but by producers, the merchants handling the goods, or the people marketing the services. Producers of steel, automobiles, and innumerable other articles and commodities deter-

3. See *Low-Income Families,* Hearings, Subcommittee, Joint Committee on the Economic Report, 81st Cong., 1st sess., p. 13.
4. *Ibid.,* p. 292.
5. *Low-Income Families and Economic Stability,* Senate Doc. No. 146, 81st Cong., 2d. sess., p. 1.

mine prices in their fields, undoubtedly with far less concern for the public welfare than government displays when it fixes prices. They defend their prerogative, admitting themselves subject to economic laws but not to man-made laws with respect to price. In peacetime the government can do little to control maximum prices in industry except by indirection. It can enforce or threaten to enforce anti-trust laws if it appears that prices are raised or kept high by combinations in restraint of trade. Congressional committees can investigate alleged unjustifiable price levels [6] and Congress can enact restrictive legislation, in the doubtful event that public sentiment will support it. The relevant point here is that although government fixes prices for particular commodities and services and sets maximum or minimum prices in other areas, what it does can have only a limited effect in stabilizing the economy because the great mass of important prices and wages are still fixed by corporations and labor unions, which are far more concerned with their own welfare than with that of the general public.

Control of Operations. In important areas government controls the actual operations of business, agriculture, and labor. For public utilities government not only regulates rates but prescribes the extent of operations. Thus a railroad or a gas company may not normally extend its lines or abandon unprofitable branches of lines without the consent of the relevant regulatory commission. A "certificate of public convenience and necessity" is normally required to engage in or extend public utility operations. The accounts of public utility corporations must be kept as prescribed by government. The marketing of securities is regulated by the Securities and Exchange Commission, and various other business practices are also regulated, including those which involve "unfair trade practices." In agriculture, government seeks to improve production per acre by various techniques, to stimulate production in certain situations and limit it in others, and to facilitate marketing. For labor it promotes and regulates collective bargaining, and it outlaws "unfair labor practices." In these and in many other ways it increasingly determines the course of operations in major fields, even when their dynamics are private rather than public. To the extent to which government exercises control it promotes, or attempts to promote, stability within the economic order. It is to be remembered, however, that stability may also mean a kind of lethargy stifling to inventiveness and ingenuity, that it may slowly devitalize the process of so-called free enterprise, and so necessitate ever more nursing and supervision from government. Illustration will be provided particularly in the discussion of railroads in the following chapter. To the extent to which government regulates in a discriminatory fashion, as when it "protects" American products by levying tariffs on competing products from abroad, it creates an economically arti-

6. See *December 1949 Steel Price Increases,* Hearings, Joint Committee on the Economic Report, 81st Cong., 2d. sess. See also the report of the committee bearing the same name, Senate Report No. 1373, 81st Cong., 2d. sess.

ficial pattern which, once created, may have to be preserved thereafter by other supporting legislation.

Government Subsidies. Government exercises power in certain areas by direct or indirect subsidies. For generations it has aided trans-oceanic shipping by paying excessively high rates for carrying mail. It is now aiding internal and external airlines through generous air-mail contracts. It pays farmers for taking land out of production of surplus crops, nominally for soil conservation. Its program of purchasing and holding many millions of dollars worth of excess crops to maintain high market prices is an indirect subsidy, since tremendous losses must be incurred in disposing of the government stores — if, indeed, they can be disposed of at all. During World War II the government spent vast sums to further war production in private plants in such a way as to constitute subsidies. The government pays subsidies when it wants certain things done, and done in particular ways — as when it signs mail contracts to encourage steamship lines and airlines; and it pays them when it wants to protect the welfare of certain groups — as in subsidizing agriculture or low cost housing projects or when providing an economic cushion for a transition in industry from war to peace production. Whatever its major purpose, the payment of subsidies both supports and controls. It plays its part in shaping the operations of the economy.

Government as Direct Operator. In important fields government also operates directly as the owner and manager of enterprises. In spite of our early tendency toward *laissez-faire* assumptions, the federal government has always operated our postal system, which has now become a gigantic agency of communication and distribution. The Reconstruction Finance Corporation, some of the agencies in the Farm Credit Administration, and certain other agencies constitute an aggregation of powerful lending agencies, a kind of banking system operating within the federal government itself. This competition, indeed, particularly that of the RFC, brings constant pressure from private banking interests to keep the RFC only as a standby agency for emergencies, or as one which might merely promote lending by guaranteeing loans made by private banks.

The Tennessee Valley Authority, discussed elsewhere, is a gigantic federal enterprise. In varying degrees at various points it supplements, competes with, and supplants private enterprise, as partial result of a political victory won in the midst of the depression of the 1930's when business prestige was low. The welfare of a tremendous area throughout the Tennessee Valley is conditioned, and in large part has been greatly improved, by the TVA. While dams, irrigation projects, flood control projects, and projects for the development and marketing of electric power elsewhere throughout the country are also operated by the federal government, they are individually less impressive and thus far provide less competition — or at any rate are less injurious to local enterprise in the same field than is the total

development sponsored by the federal government in the Tennessee Valley. Not too much should be said of this difference, however, since the prosperity brought to the Tennessee Valley by the federal government has supported a great expansion of private business which could not have been expected but for government intervention.

During World War II the federal government financed construction of steel plants, shipyards, and establishments of many other kinds for the production of war materials. The government retained ownership until after the war, even though in many instances operations were placed in the hands of private corporations. Postwar government sale of many plants to established private corporations at far less than the original cost reflects in part, perhaps, the necessary economic waste in the rapid construction of plants in wartime, and in part a necessary government subsidization of industry, since the postwar market for plants would not permit the government to recover their true value. The government carries on a vast enterprise in the construction of ships for the navy, it carries on major research and development projects in connection with armaments, and it carries on the expanding work of the Atomic Energy Commission which is expected to contribute to both military and non-military developments. The government, in other words, is a gigantic industrialist in its own right.

Government Spending. Government spending runs through all these operations, and includes particularly regulation, subsidies, and the direct ownership and operation of enterprise. Annual government expenditures of more than $40 billion equal almost one-fifth of the national income. The allocation of these expenditures, whether for military or industrial equipment, social services, or interest on the national debt, is inevitably an important factor in shaping the national economy.

Money and Credit Controls. We discussed in the preceding chapter the uses of controls over money and credit to balance the economy. A subcommittee of the Joint Committee on the Economic Report argues that such controls are far more democratic than more direct action for the regulation of enterprise:

> Another reason for preferring reliance on monetary, credit, and fiscal policies as the major method of general economic stabilization is that they are more consistent with the maintenance of our democratic system and with the fostering and promotion of free competitive enterprise. These instruments do not involve the government in detailed controls of the particulars of the economy; they do not require the government to intervene in individual transactions between buyer and seller, in dealings between employer and employee, and in the determination of the prices and production of particular commodities. These millions of intricate decisions are left to the operation of the market mechanism while general monetary, credit, and fiscal policies work toward stabilization by influencing the total supply and cost of money and the total amount of money income at the disposal of the private sectors of the economy. There is every difference between the effects of general over-all monetary, credit, and fiscal policies which indi-

> rectly influence the economy toward stabilization and the effects of an elaborate system of direct controls.[7]

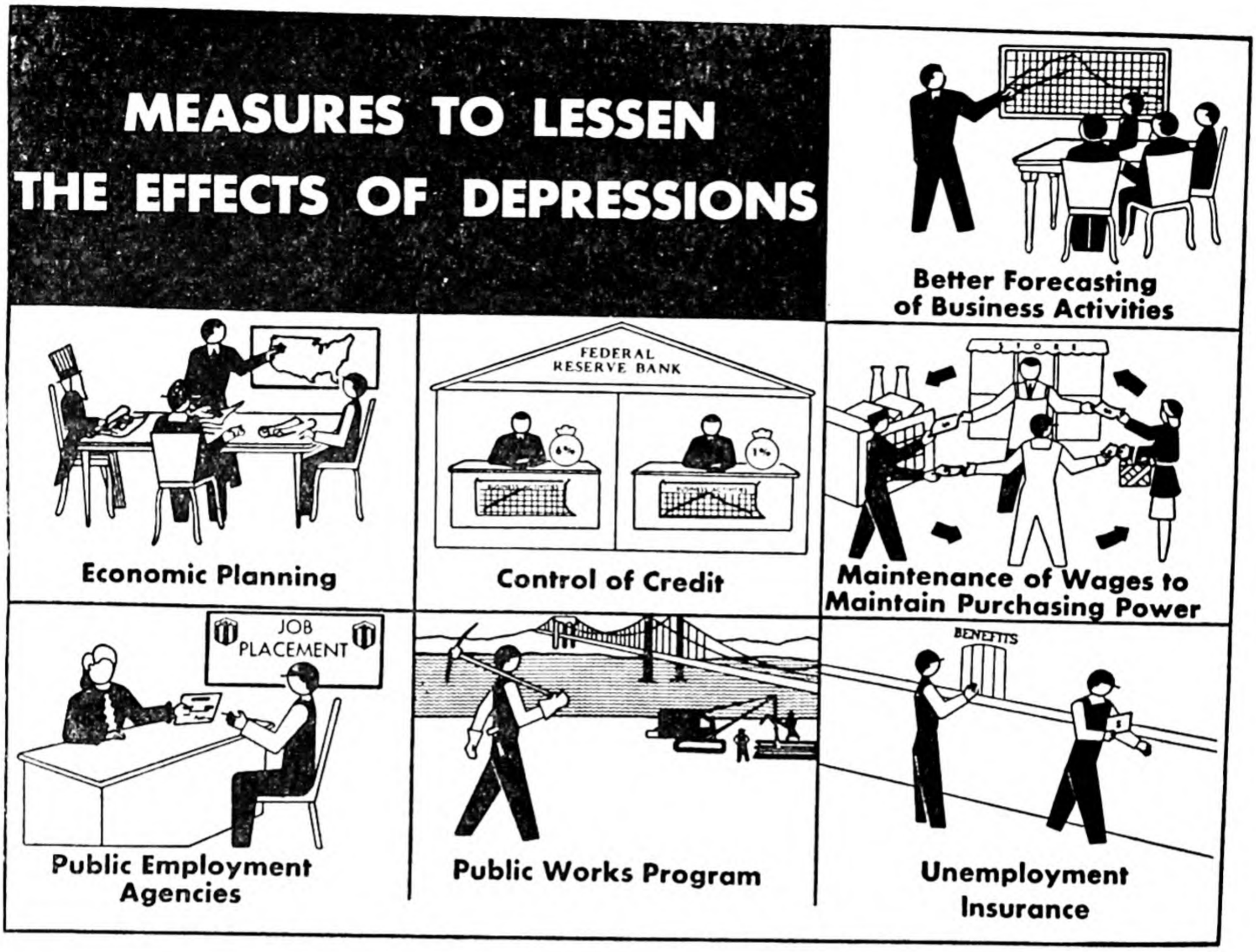
As the committee saw it, stabilization could be promoted by the proper use of financial mechanisms, leaving business partly free from otherwise necessary but highly irritating and restrictive government controls. As stated by a witness before the committee,

> Direct controls do involve government decisions about the particular interrelationships of the parts of the economy. One virtue claimed for them by their advocates is that they are "selective." But adding together a very large number of selective controls is surely a clumsy, expensive, inefficient, and politically dangerous way to get the over-all effect needed to deal with the stability problem. While the market process is not perfect, any general substitution of government decisions for it would result in serious loss of efficiency, progress, and stability.[8]

Resort to broad financial controls, in short, is regarded by some people as the last hope of a free enterprise system, as the only possible choice in a seeming dilemma wherein failure to exercise government control means chaos and the exercise of such control means regimentation destructive of the remaining elements of free enterprise and a threat to democratic processes. No one pretends, however, that all controls other than financial ones can be completely avoided. In practice, financial controls must be exercised along with the varied other controls discussed above. We cannot rely upon a single type of control for stabilizing the economy any more than we can rely upon a single source of revenue for support of the government.

Consumption and Purchasing Power. It has become increasingly clear in recent years that to insure economic stability we must often clear "log-jams" blocking the distribution of goods and give thought to the development of purchasing power as well as to production. The depression of the 1930's saw the accumulation of great quantities of unused goods and large-scale unemployment, so that it looked as if there had been during the 1920's excess production of goods which would have to be consumed before the productive system could once more operate at full capacity. Actually the broad problem was not one of excess production, for there was need for most of the goods that had been produced; rather it was one of under-consumption. The goods were needed but the people were not able to buy, and the growth of unemployment made them even less so. It contributed not to the consumption of excess goods but to the inability of the people to buy the goods which they needed. Something had to be done, therefore, to reestablish purchasing power so people could buy goods in plentiful supply and thereby create a need for more, a need which would stimulate natural employment in the production of the newly needed goods.

7. *Monetary, Credit, and Fiscal Policies,* Senate Doc. No. 129, 81st Cong., 2d. sess., p. 9.
8. Statement of J. Cameron Thompson, *ibid.*, p. 10.



Part of the program of the New Deal, therefore, was directed toward building up purchasing power. Wherever possible the federal government instituted directly, or helped state and local governments to institute, public works of various kinds to provide employment. Such employment was intended to put purchasing power in the hands of the workers. The purchasing power would create new demand for goods, and the demand would stimulate new production and therefore still further stimulate employment. When it proved impossible to get under way immediately enough sound public works projects to provide the necessary relief for the unemployed and give a sufficient boost to purchasing power — projects such as the construction of highways and schools and other public buildings — the government instituted lesser projects of sometimes doubtful economic value, "leaf-raking" projects which were derided for their wastefulness but nevertheless provided much-needed help for the unemployed and presumably played a part in reversing the descending economic spiral.

Since the New Deal period we have generally assumed that in time of depression, or of anticipated depression, government has an obligation to provide a slate of public works projects to give employment and raise purchasing power. On that assumption many people talked of projects such as a series of huge new highway systems to be built across the United States to cushion the sharp slump which was expected after the close of World War II during the transition from war to peacetime production. The

anticipated period of unemployment did not develop, and because of material shortages created by the war it might have been next to impossible to get the projects under way in time to prevent serious unemployment if it had threatened, but the concept of government responsibility in such matters is now well entrenched.

Labor Legislation and Purchasing Power. One of the purposes of labor legislation which either fixes wages and hours or aids labor organizations in collective bargaining is to set standards so that work and wages will be distributed among the maximum number of workers it is feasible to employ, with the consequent leveling effect on purchasing power. Adequate wages are justified, in other words, not only in terms of the needs and rights of workers but also in terms of the economic soundness of widely distributed purchasing power. If enough people have enough money to buy consumers' goods, industrial machinery will be used for production. If the workers have too little purchasing power, or if it is not distributed among a sufficiently large number of purchasers, the total consumer potential will not be used, and production will yield unconsumed surpluses or will have to be cut, with consequent curtailment of employment.

Cushions for Unemployment and Old Age. The aspects of our social security program which provide for payments during periods of unemployment and during old age may be looked on in the same fashion. Because of the social security program many people are less fearful of the beginning of a serious depression than they would otherwise be. Without unemployment compensation, people out of work would have to stop buying as soon as their savings were consumed, and they might feel obligated to stop earlier for their ultimate protection. Immediate cessation of purchasing by any large group of people in any locality can be disastrous for the local economy and may have widespread repercussions. Similarly, the necessity of carrying large numbers of old people without income means a lack of proper connection between consumer needs and purchasing power. With unemployment compensation and payments during old age, the unemployed and the aged can go on buying, at least to the extent of the payments. The payments do not stop with the threat of depression, as wages often may, and the continuation of consumer purchasing helps to maintain the even course of the economy and alleviate the threat of depression.

It is not our purpose here to suggest that no social losses result from providing these and other forms of relative security. It may well be that there is a personal and cultural loss in permitting some people to rely on government support instead of developing the skill and stamina to take care of themselves when times are hard. It is no doubt true that some people would work harder and try harder to keep their jobs if they could count on no protection from government, and some of them would be better off for having to meet this aspect of life's discipline. However, the impersonality of our industrial system is a pretty grim phenomenon for an individual

without backing to face, and its impact can be harsh enough in spite of such cushioning as is done by government. While the new protections are sometimes abused, they are in general needed by the individuals protected, and, as discussed above, they contribute to the stability of the economic system as a whole.

The Multitude of Services. While aid to labor, the unemployed, and the aged always has its financial side and so its relation to the stabilization of the economy, it has also its important non-economic aspects. In giving people a sense of security, and in doing it in such a way as to preserve their sense of personal worth, we mold the character of the nation. While in some respects other institutions are far more important in the lives of the people than their government is, it is true in broad areas that what our people will be in the future depends on what the government of today does to and for them. This is true of many other services and controls than those already mentioned. The relation of government to education, the impact of government on the course of education, was discussed in an earlier chapter. In a sense the government has become a gigantic educational institution, operating not merely or perhaps not even primarily through schools but through all the agencies of communication which broadcast the activities and the points of view of government personnel and organizations. The health services provided or financed by government aid in prolonging the life span and in making life more enjoyable while it lasts. Its financing of housing projects and loans for housing purposes have made life more comfortable for many people, as did the fixing of rents for a long period during and after World War II. Through the Department of Agriculture and other sources, farmers have been greatly aided by information and advice which enabies them to make better use of farms and farm products and to live more richly. Innumerable other services rendered by government likewise improve living conditions.

Stimulation and Coordination of Science. While discussion of military matters and the conduct of foreign affairs generally will be left to another section of this book, it should be noted here that government in many ways shapes the pattern of scientific development in this country. It finances scientific investigation by letting research contracts to colleges and universities and to corporations having scientific research facilities. The contracts call for applied research in various fields and also influence the course of pure science. For example, the fact that the Atomic Energy Commission and other sponsoring agencies are financing and otherwise encouraging scientific work in particular fields has a widespread influence over the general pattern of scientific development. It was to mobilize the scientific resources of the nation that Congress in 1950 established the National Science Foundation. That agency is expected to bring about a greater unity of scientific investigation than has thus far existed, to make plans for facilitating cooperative effort, and give direction to investigation in terms of national

needs. Thus while some laboratories will continue to house lone investigators pursuing isolated trails in scientific fields, and individual laboratories will continue to serve the needs of particular corporations which provide them, attempts are being made increasingly to draw results together and to provide for directed research in areas most deeply involving the national welfare.

UNITY OF PURPOSE AND EFFECT

It appears from the above paragraphs that the federal government now intervenes at all important points in our economy to condition its operations. It taxes, coerces, manages, directs, stimulates, discourages, forbids, finances, protects, shelters, and performs various other kinds of activities in connection with individual and group behavior. These activities have their inconsistencies and conflicts, but they add up to increasingly centralized guidance of human behavior by the federal government. They reflect or constitute an increasingly corporate society, with the heart of that corporateness in the government itself. While we do not have a "corporate state" in the sense in which the term was used by Italian Fascists under Benito Mussolini, we do have a growing oneness in the American people as a whole. We are of course not completely unified, or as completely unified as a society could be. We do not have anything like the ideal of national oneness which inspired the Nazis and the Fascists. To a great extent we still find our basic values in individuals and in groups within our society rather than in the union of people which we constitute. To an unmeasured extent we still go our own way as individuals and groups — even though the ways we may travel alone are now curbed at innumerable points where no curbs existed a few decades ago. Furthermore, whereas we once relied almost exclusively on ourselves for our own support and for the planning of our lives and our economic activities, we now find it convenient and necessary to rely upon central coordination by government rather than to ride out depressions and periods of unemployment on our own and take individual responsibility for our old age. We once thought we knew the rules for achieving prosperity and could achieve it largely without help from others and certainly without help from government. Now we are quite ready to accept guidance over vast areas, however we may resent it and perhaps resist it in others, and we think it the responsibility of government to chart, or at any rate to clear, the paths of economic activity which we ought to follow.

By resort to the positive state, therefore, we are achieving a kind of national oneness. We know that some such unity is probably necessary if we are to operate so complex and interdependent an economic system as that we now have. We know that interdependence requires order. We do not yet fully know the price of order. We do not know whether the centralization of management in government which has now taken place is but the forerunner of unmeasured further centralization which must take

place if we are to continue increasing our economic interdependence or whether, in spite of increasing interdependence and increasing need for order, we shall be able to select functions for decentralization. It may be, in other words, that in traveling unfamiliar ground and while heckled by wars and depressions, we have let ourselves be stampeded into wholesale centralization which the circumstances, seen in calmer perspective, would not require or even encourage. It may be that the nazi, fascist, and communist patterns against which we have fought have captured our imaginations in spite of the military and political victories we have been able to win, and that we have unnecessarily imbibed some of the more dangerous essences which have animated our enemies and competitors.

But this is not necessarily true, or if true in some degree, it is not necessarily of prime importance. It perhaps behooves us to remember that while professing love for individual liberty we have resorted more and more to an economic system which makes each man dependent on the mass of his fellows and increases his responsibility for the welfare of other men. Centralization of power in government may mean merely the end result of practices to which we have long since committed ourselves. While we cannot say that it is too late to change our economic system, to reverse the process of increasing interdependence — for our system is always changing and at a tremendous rate — such a reversal would be so inconsistent with past and present trends in the United States and in the world at large that it is almost inconceivable. It seems probable that the dynamics of collectivism, the collectivism which has given us the huge corporation as the instrument of enterprise and the labor union as the instrument of resistance to its power over workers, will extend much farther still before we reach the saturation point of interdependence and of the regimentation which flows from it. How fast and how far the positive state will move in that direction will depend on the prevailing body of common assumptions and the mentalities of our leaders, which will be discussed immediately hereafter, and on the military situation, which will be discussed in later chapters.

THE BODY OF COMMON ASSUMPTIONS

The Merits of Bigness. Among the common assumptions (consistent or not) which dominate American thought about our economy and our government is the notion that bigness in and of itself is admirable and desirable. Our forbears have taken pride in the expanding size of the country, in the decennial census reports of growth in population, in our expanding production, in the size and height of public buildings, in the size and productivity of our factories, in the growth of local communities, in the number of children in our schools, and in almost everything else by which great or growing size is indicated. There have even been times when the number of the unemployed and the size of the national debt seemed to have a kind of fascination! There has been and no doubt still is a tendency to

believe that size and quality go hand in hand. We have attached so much importance to size that failure to continue growing carries a kind of stigma. We insist on thinking in terms of an ever-expanding economy, for example, assuming that if expansion comes to an end that fact in itself marks the beginning of retrogression. It requires a certain acceptance of defeat to consider the possibility of having smaller totals of industrial production than any other country, or a smaller military establishment, or a declining flow of exports, or other evidence of failure to expand or to compete successfully.

The Merits of Competition. Along with bigness we have glorified competition. It has been for us "the life of trade." We have assumed that man best uses his powers when pitted against his fellows, and that competition in the business world is the best insurance of fair treatment for consumers. We find something fundamentally right in prices which are fixed through competition, whereas prices fixed by government or by private monopoly are suspect. The ideals of bigness and of competition may or may not be consistent with each other. If one firm drives another out of business through better service or lower prices, its success may properly be regarded as the proper fruit of competition. On the other hand, if by destructive competition it takes over an entire market, then competition comes to an end and bigness may become a menace. We maintain anti-trust laws to restrict monopoly and combinations in restraint of trade. During World War II we established special agencies in the federal government to protect the rights of small business, and congressional sub-committees still have responsibility for giving special attention to those rights. On the whole, bigness tends to prevail over competition as an ideal, but both must be taken into account in appraising the sphere of government.

Liberty and Opportunity. Throughout our history we have perhaps talked more of the combination of liberty and opportunity offered to the individual than of any other characteristic of our culture. Ours has been a "land of liberty." With the fervor of evangelists we long urged the oppressed peoples of the world to come where they could be truly free and where unparalleled opportunity awaited the liberty-loving, the industrious, and the ingenious. We have boasted that our enterprise is "free enterprise." Whether the term is an illusion or a reality where enterprise is conducted by great corporations, it has for business a psychological value in its resistance to the expansion of government controls and government competition with private business. In recent years it has been questioned whether the concepts of liberty and equality are any longer twins. During the depression of the 1930's millions of our people possessed liberty in the negative sense, but had little opportunity to use it in fruitful living. Opportunity within our present political and economic system requires ever more conformity of the individual, conformity without which he cannot fit into the complex pattern of production and distribution of goods and services and

keep out of the way of other people who likewise need their opportunity. Emphasis, therefore, is tending to shift from liberty to equality.

Equality. The American people have always lauded the merits of equality, but they have also looked upon it with reservations. They have demanded "equal justice for all," and they have been enthusiastic about equality of opportunity. They have boasted that in this country "one man is as good as another." However, they have also gloried in the ability of some men to gain more wealth and win more power and distinction than others, and have regarded the inequalities of success or failure as entirely fitting in our scheme of things. They have always had some of the feeling that a man has a moral obligation to be a success, and that failure is the just punishment for lack of effort or self-discipline. With the change in the character of our economic system, however, the attitude toward equality of right is changing. Within a complex society such as ours has become, men are not masters of their fate in the sense our pioneer forefathers were. Although the modern American must of course make the greatest possible effort if he is to be successful, he must not merely try very hard, but he must also fit well into a complicated social and economic mechanism. He may have all the potentialities of success under certain circumstances, but be unable to find his place for himself in our system. He may be willing to work but find himself without opportunity for employment. He may have developed certain skills with which to earn a living but find them rendered obsolete by recent inventions. It may appear that he has been born a decade too soon or a decade too late to fit into the pattern of our economic machinery. If he has a position, he may feel entitled to a better one or to better pay, yet find himself unable to secure advancement. Since his right to employment and the value of his services are harder to measure than ever before, he must turn, or at any rate he has turned more and more, to the concept of equality as the measure of his deserts. In the light of this changing attitude, government provides equality to the extent of setting minimum wages. It supports the right of collective bargaining to insure mass payment of wages and prescription of working hours. The level is still rising at which it attempts to provide equal educational opportunities, and it enforces many other standards of uniformity. It has become the instrument of enforcing equal rights in areas where right can be adequately measured in no other way — and, under pressure, it often enforces equality in the face of the conviction that to give equality of reward is to do injustice rather than justice. Standards of equality are increasingly demanded and increasingly applied, as characteristics of a society which has become so complex as to require a vast amount of regimentation.

Security. The demand for equality is in large part a demand for security. The American pioneers expected to find security in the work of their own hands. They built their own houses, produced their own food, and traded

individual products for individual purchases. They kept and used their own firearms for their own defense. Although they relied somewhat on local community effort, they expected by and large to be as secure as they deserved to be, with deserts measured by their ingenuity, skill, and industry. No modern man can safely act on the same assumption. His military security — which will be discussed elsewhere — wholly depends on national planning and national effort. The individual is no more than a small cog in a vast mechanism, and particular individuals may find no place in the mechanism at all. A similar change has come about in the security which comes from earning a livelihood. Our forefathers could start a new business on a small amount of capital and have some chance of succeeding with it. The businessman of today cannot in the same fashion start a steel factory, an automobile factory, or a newspaper. The capital requirements for success are enormous, and production and distribution must fit into an economy infinitely more complicated than that our forefathers knew. Almost all of us must spend most of our time working for other people, and most of our compensation is translated into the form of dollars or dollar credits before it is retransformed into goods and services which we can consume. If the mechanism breaks down or works badly we suffer individually even though the fault may be none of our own. Hence we increasingly demand of society that it shelter us against unemployment and other misfortunes and that it provide for us directly innumerable services which our forefathers would have provided directly for themselves, or would have been content to purchase individually, or would have done without altogether. Since we can not make ourselves secure, we demand that governments provide security for us. We justify our demand on the ground that security is a function of the whole economic and governmental mechanism and can be provided only by action at the center of control.

THE BIASES OF LEADERSHIP

The body of common assumptions, discussed above, which are held by large numbers of people but with varying degrees of assurance and which varyingly tend to support or neutralize one another, must be kept in mind in any appraisal of the continuing development of the positive state. We must take into account also the biases of the leadership groups which compete for control in government and influence government trends. These groups include professional politicians, lawyers, professional administrators, economists, scientists, and the military.

Professional politicians are concerned with winning and holding political power for themselves and their parties. Their strategy in government is to please the people well enough to stay in office, under the pleasing conviction, no doubt, that the welfare of the country requires their continued leadership. In matters of taxation, government spending, government control of enterprise, national defense, and international relations generally, these men are greatly influenced by what the people want. They are likely

to be jealous of experts, whether in administration or in economic, scientific, or military matters. The one group of experts they do not particularly distrust is the lawyer group, to which many politicians themselves belong. The lawyer's preoccupation with making every question a legal one and with finding legal answers which coincide with his own interests or those of his clients fits well into the flexible pattern of behavior which the politician seeks to preserve for himself.

The public administrators are concerned with the rituals of getting things done, with efficiency in administration and the routines which allegedly bring it about. They are not concerned primarily with pleasing the people, as professional politicians are, or with the legal questions and approach which have so much appeal for lawyers. The administrator is enamored of the "chain of command" and is irritated by the inefficiency involved in the separation of powers and in checks and balances. He may believe passionately in government *for* the people and may show great zeal in its behalf, but he has little patience with government *by* the people. In an important sense, therefore, he is anti-democratic in his leanings. His group consists of people who are allegedly experts in the process of governing rather than in making government policy, but it nevertheless tends to mold policy in the process of governing.

Economists, scientists, and military men are likewise experts who tend to influence the course of government according to their own point of view. Economists with particular beliefs about banking policy, about financial policy generally, about the relation of bigness to production and distribution, and about foreign trade and other matters play a part in shaping the course of administration, and to a limited extent they influence the thinking of the people at large and of their representatives in Congress. We have already discussed the new trend in the beliefs of professional economists about the control of money and credit and about the desirability or undesirability of balancing the government budget annually. The increasing complexity of the problems with which government must deal drives it to depend on economic experts more and more, but the influence of cliques of economists with their professional fads creates anxiety among politicians and among the people at large.

With the growing importance of science in military matters, and less conspicuously, in shaping the course of industrial development, the natural scientist becomes increasingly important in government leadership. He brings to government a kind of objectivity which most other groups do not possess, and also a kind of naiveté where matters of social control are concerned. Professionally he is chiefly preoccupied with the search for truth in the area of measureable phenomena. His professional habit-pattern calls for pooling knowledge and building on the accumulation, in the belief that all discovery and publication of truth is desirable. He has tended to assume that the use of scientific truth by society is not primarily his concern. Military developments in recent years, however, have forced some changes in this pattern. During World War II we had to surround a large

part of American scientific activity with a wall of secrecy to protect our military discoveries and inventions from the enemy. Since then we have had to isolate scientists to protect us against the enemy in the "cold war." Many scientists have not taken kindly to investigation of their loyalty, to clearance for war purposes, and to the necessity of keeping discoveries secret instead of giving them to the public. Some of them have suddenly become conscious of the immediate relation of science to human survival. They have sensed the threat of atomic developments to the continuation of human existence, and have become ardent advocates of various political policies to protect us against the instruments they have themselves developed — though they have lacked adequate knowledge of the intricacies of problems of government. They need social science education for full living in the modern world and for leadership in government, just as the social sciences need natural science education.

The outlook of the military — as discussed in a later chapter — is almost by definition anti-democratic. It envisages the mobilization of armed might for the greatest possible military impact on the enemy. It puts a premium on skill in war and on the fitness of the military to prescribe the pattern of non-military government to the extent that control is deemed necessary to successful military operations. Like every other expert group, the military tends to overreach its jurisdiction and must be held in check by competing forces in society. Its necessary extension in recent years, however, has made the bias of military leadership a matter of greater concern than ever before in American history.

THE SYNTHESIS OF THE POSITIVE STATE

The influence of these various leadership groups, like the body of common assumptions discussed above, must be taken into account in studying and in estimating for the future the operations of the positive state. All the innumerable factors in our society work their way into a kind of integrated total of human behavior. The integration of all factors in our society into a pattern, the elimination of uncoordinated individualism, is proceeding steadily. Because of the direction in which we are going we tend to be much more conscious of the increasing exercise of centralized power than of the continuing areas of freedom and individualism. This preoccupation with the growth of power should not lead us to conclude that we are wholly regimented today and that areas of liberty and unregimented activity no longer exist. Each new extension of control reminds us that, whether or not it was desirable, a particular area of freedom had till then existed. Some freedom will exist until no increase in regimentation is possible. No such saturation point is anywhere in sight, and when our system of government is compared with fascist, nazi, and communist systems, the continued existence of broad areas of freedom becomes obvious. There is a lack of ruthlessness about our system, furthermore, a concern about the welfare of the individual and the component groups of our society, which protects

fundamental freedoms in varying degrees even as the total of control is extended. In analyzing the character of our system, factors of this kind must be considered, along with the evidence of continued extension of control. We strive to maintain, and to some extent we do maintain, a desirable synthesis of liberty and control.

References

Thurman W. Arnold, Morris L. Ernst, et al., *The Future of Democratic Capitalism* (University of Pennsylvania Press, 1950).

Charles A. Beard, *The Idea of National Interest* (Macmillan, 1934).

———, *Public Policy and the General Welfare* (Rinehart, 1941).

Persia C. Campbell, *Consumer Representation in the New Deal* (Columbia University Press, 1940).

John M. Clark, *Alternative to Serfdom* (Knopf, 1948).

J. Frederick Dewhurst, et al., *America's Needs and Resources* (Twentieth Century Fund, 1947).

The Economic Reports of the President (Reynal & Hitchcock, 1948).

Herman Finer, *Road to Reaction* (Atlantic, Little, Brown, 1945).

George B. Galloway and associates, *Planning for America* (Holt, 1941).

Walton H. Hamilton and Douglas Adair, *The Power to Govern* (Norton, 1937).

E. Pendleton Herring, *The Impact of War* (Farrar & Rinehart, 1941).

———, *Public Administration and the Public Interest* (McGraw-Hill, 1936).

Arthur N. Holcombe, *Our More Perfect Union* (Harvard University Press, 1950).

Samuel P. Kaidonovsky, *Consumer Standards* (Government Printing Office, 1941).

Leslie Lipson, *The Politics of Equality* (University of Chicago Press, 1948).

Robert M. MacIver, *The Web of Government* (Macmillan, 1947).

Joseph Rosenfarb, *Freedom and the Administrative State* (Harpers, 1948).

Sumner H. Slichter, *The American Economy* (Knopf, 1948).

Warren C. Waite and Ralph Cassady Jr., *The Consumer and the Economic Order* (McGraw-Hill, 2d. ed., 1949).

Iris C. Walker, *Consumer Services of Government Agencies* (Government Printing Office, 1938).

26

Transportation and Communication

Promotion of transportation and communication was much in the minds of the men who drafted and brought about the adoption of the Constitution. The document was in a sense a businessman's Constitution. Among other things, it sought to remove the barriers to trade which the states were creating at their borders to protect their own products from neighboring competition and to raise revenue by discriminatory taxes on imported products. To give protection against discriminatory action by the states, the Constitution provided that Congress should have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This power of Congress, commonly known as the commerce power, was sweeping in its scope. It was directly limited only by such clauses as those which forbade the laying of any tax or duty on articles exported from any state, giving preferences to the ports of one state over another, and requiring that vessels moving from one state to another should pay entrance or exit duties. Even if Congress failed to use it, the power stood to an undefined extent as a prohibition upon regulatory action by the states. In addition, Congress was given power "to establish post offices and post roads."

On the basis of these constitutional provisions, Congress has established a vast network of regulations and agencies to promote and control transportation and communication. The federal government directly operates the postal system. It helps finance road building and, by means of mail contracts and in other ways, it subsidizes or has subsidized from time to time railroads, steamship companies, and airlines. It regulates interstate and foreign commerce by railroad, steamship, aircraft, pipe line, bus, truck, telephone, telegraph, and television. It attempts to keep its regulations in the several fields consistent one with another. The aggregate of federal activities in these fields goes a long way toward shaping the pattern of the American economic system. Because regulations and mechanisms vary from field to field, each field requires a measure of discussion.

THE POSTAL SYSTEM

Character of the Institution. But for its venerable age, the federal postal system might well be regarded as a gigantic experiment in socialism. The provision of mail service by government marks a tradition which extended well back into the colonial period and into the experience of the mother country. Although the postal service has been expanded to include the carrying of commodities in competition with private enterprise, its traditional connection with government usually protects it from the criticism of those who condemn socialistic advances. It is an indispensable means of communication, it facilitates the distribution of information at low cost, it transports commodities by parcel post, it transports funds by money order, it operates as a banker through accepting what are called postal savings, and it is a government agent for the sale of war bonds.

Postal service is not only a convenience to all individuals but a necessity to American business. Denial of postal service to the ordinary business firm would be disastrous. Congress has policed business by prohibiting the use of the mails for fraudulent purposes and for the transmission of threats and materials which are defamatory, licentious, or in certain other respects objectionable. Thus the postal power is to some extent an instrument for enforcing the prevailing code of morality.

There are limits, however, beyond which postal authorities are not permitted to go in censoring the contents of the mails, and they have not been upheld in certain attempts to deny second class mailing rates to publications carrying materials they deemed objectionable. Second class mail is a category for the classification of periodicals sent at rates deliberately kept low in order to facilitate public education. Postal authorities from time to time have attempted to establish standards for the measurement of second class mail in terms of their own conceptions of what the relevant statute calls "information of a public character, or devoted to literature, the sciences, arts, or some other special industry." In the early 1940's, the Postmaster General denied second class mailing privileges to *Esquire* magazine because of the brand of humor and suggestiveness in some of its jokes, pictures, cartoons, articles, and poems. The Supreme Court noted that the controversy was not whether the magazine published information of a public character or was devoted to literature or to the arts. It was whether the contents were good or bad.

> To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred.[1]

Congress had provided the favorable second class rates for periodicals, the Court declared, so that the public good might be served through the dissemination of the class of periodicals described.

> But that is a far cry from assuming that Congress had any idea that each applicant for the second-class rates must convince the Postmaster General

1. *Hannegan* v. *Esquire*, 327 U.S. 146, 151 (1946).

that his publication positively contributes to the public good or public welfare. Under our system of government there is an accommodation for the widest variety of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. . . . The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted. But Congress has left the Postmaster General with no power to prescribe standards for the literature or the art which a mailable periodical disseminates.[2]

The Post Office Department. The postal service is administered by the Post Office Department. The department is headed by the Postmaster General, who is a member of the President's cabinet. Beneath him is a Deputy Postmaster General in a position equivalent to that of Under-Secretary, and there are four Assistant Postmasters General. The department is served by a newly established advisory board chosen from different elements in the public. For many years the Postmaster General has usually been chairman of the national committee of the President's political party, and hence the President's chief political lieutenant. As head of the largest non-military department of the government — the number of employees in January, 1950, was more than 500,000 [3] — he has supervised his party's affairs and distributed patronage to the party faithful. He has retained this party position even as extension of the merit system has withdrawn large numbers of his employees from party control. As the department has grown in size and responsibility, the need for a different kind of head has become increasingly apparent. President Truman broke with tradition by promoting to the headship one of its career men. The Hoover Commission recommended that the Postmaster General "should not be an official of a political party, such as Chairman of a National Committee." [4] Noting that over 22,000 postal employees were in fact politically appointed in spite of attempts at merit system coverage, including first, second, and third class postmasters and some top officials, the commission argued that "The Post Office should be taken out of politics." [5]

The Post Office Department is the one department of the federal government which earns considerable revenues from its operations. It was estimated that for the fiscal year 1951 the total of postal expenditures would be $2,235,607,000, of which $1,681,000,000 would be derived from postal revenues and the remaining $554,607,000 would be paid from general funds in the treasury, that is, from funds raised by taxation.[6] The half billion dollar deficit does not necessarily reflect inefficiency, although the Hoover Commission showed considerable dissatisfaction on that point. With key officers selected for political reasons and with salaries and postal rates

2. *Ibid.*, pp. 157–58.
3. See *Congressional Record* (temporary daily edition), March 23, 1950, p. 3965.
4. *The Post Office,* House Doc. No. 76, 81st Cong., 1st sess., p. 8.
5. *Ibid.*, p. 9.
6. *General Appropriation Bill 1951,* House Report No. 1797, 81st Cong., 2d. sess., p. 75.

fixed by Congress and shipping rates fixed by the Interstate Commerce Commission and the Civil Aeronautics Board, the department could hardly be expected to meet the budgetary standards of a private express or freight agency. The Hoover Commission recommended that in view of the business character of the department's operations it be subjected to a business audit, as distinguished from the type of audit used in departments which earn no income, that the Postmaster General be authorized to adjust postal rates in each field to cover the cost of service, and that the amounts of subsidies allocated to transportation agencies should be paid to the Post Office by open appropriations from tax funds and not imposed upon the Post Office or the mail users in this hidden manner." [7]

The services of the department so permeate American life that the postman has become perhaps the best known and the most commonplace of public servants, and it may not be too much to say that he is the most useful. He is an essential instrument of a communications system which is vital to the American people. The postal system is a gigantic business enterprise, which offers business opportunities to transportation agencies such as railroads, steamships, motor carriers, and aircraft. From the point of view of its operation as a business, it is unfortunate that mail contracts are used not merely to compensate carriers for their work but to provide subsidies as well. It is unfortunate also that government is under pressure from private interests in fixing postal rates, as for the circulation of periodicals. The so-called second class rates are said to be substantially lower than they should be to pay the cost of distribution.

RAILROADS

Private Enterprise. In its early years the federal government provided funds for construction of certain important highways and aided in the construction of canals and railroads by the purchase of stock, but it never entered upon a program of railroad construction and operation comparable to its operation of the postal system. By the time railroad construction had begun to be important, about the beginning of the second third of the nineteenth century, the use of private corporations as instruments for the accumulation of capital and the development of enterprise had been sufficiently well worked out to head off any popular demand which might otherwise have developed for governmental leadership. The construction of new railroads became a fascinating adventure for both managers and investors. New lines were sometimes built before the country was ready to make adequate use of them, with consequent loss to investors, and other losses occurred as a result of mismanagement of funds. Many companies made enemies of the shippers and investors who had urged and participated in their construction, but in spite of these and other evils, a network of railroads continued to expand. Originally disconnected short lines were extended and joined to provide railroad transportation in all directions and for

7. *The Post Office, op. cit.*, p. 17.

great distances. To facilitate westward construction to or toward the Pacific coast, the federal government chartered some companies, made extensive loans, and made grants of vast acreages of land.

The first railroads constructed were operated with a minimum of governmental regulation of any kind. Because they usually covered only short distances, such regulation as was necessary was provided by state and local governments. The amount of state regulation increased during the post-Civil War depression as shippers, resentful of high rates and unequal treatment, made themselves felt in state legislatures. In cases decided in 1877, the Supreme Court rejected the contentions of railroad companies that state regulation was forbidden by the federal Constitution. The Court held that the business was "affected with a public interest," and as such was by tradition subject to governmental control of rates.[8]

The connecting of short railroad lines to make long ones and the construction of transcontinental lines meant that more and more the railroads carried goods and persons from one state to another. The Supreme Court initially held that, in the absence of federal regulation, the states might regulate railroad business within their borders even though the goods involved moved into or came from another state. Railroad lawyers, however, contended in various federal courts that for a state to regulate interstate commerce even within its own borders was to violate the commerce clause of the Constitution. In the Wabash case, in 1886, the Supreme Court agreed to that contention, thereby nullifying the exercise of state power over an increasing amount of railroad business.[9]

The Wabash case played into the debate then proceeding in Congress as to whether the federal government should itself legislate with respect to railroad business in interstate commerce and provide machinery for regulation. It probably speeded enactment of what has come to be called the Interstate Commerce Act, which was passed in 1887.

The Interstate Commerce Act. This act, with the amendments which have been added from time to time, constitutes virtually a code of regulations for that large proportion of railroad business which is interstate commerce or which so affects interstate commerce that it is subject to federal regulation. In addition to making regulatory provisions, the statute created the Interstate Commerce Commission, the first of the independent regulatory commissions to be established in the federal government. This body consists of eleven men who are appointed by the President by and with the advice and consent of the Senate for seven year terms. It combines legislative, executive, and judicial functions and regulates a great variety of railroad activities. It is directed to maintain just, reasonable, and non-discriminatory rates. Acting either on its own initiative or on complaint by interested parties, it investigates operations and prescribes the rates, charges,

8. See *Munn* v. *Illinois,* 94 U.S. 113 (1877) and *Chicago, Burlington and Quincy Railroad Co.* v. *Quincy,* 94 U.S. 155 (1877) and other railroad cases decided therewith.
9. *Wabash, St. Louis, and Pacific Railway Co.* v. *Illinois,* 118 U.S. 577 (1886).

regulations, and practices to be observed. Although rate schedules are actually worked out primarily by the railroads themselves, the commission has power either to draft or to modify the schedules. It may require the establishment of through rates to promote interstate commerce involving two or more railroad lines. The commission also supervises various other aspects of the railroad business. It attempts to protect the public interest by acting on problems of competition between railroads and other forms of transportation. It passes upon applications for construction of new lines and abandonment of old ones. It examines into railroad plans for the marketing of new securities. It supervises railroad bankruptcy and reorganization.

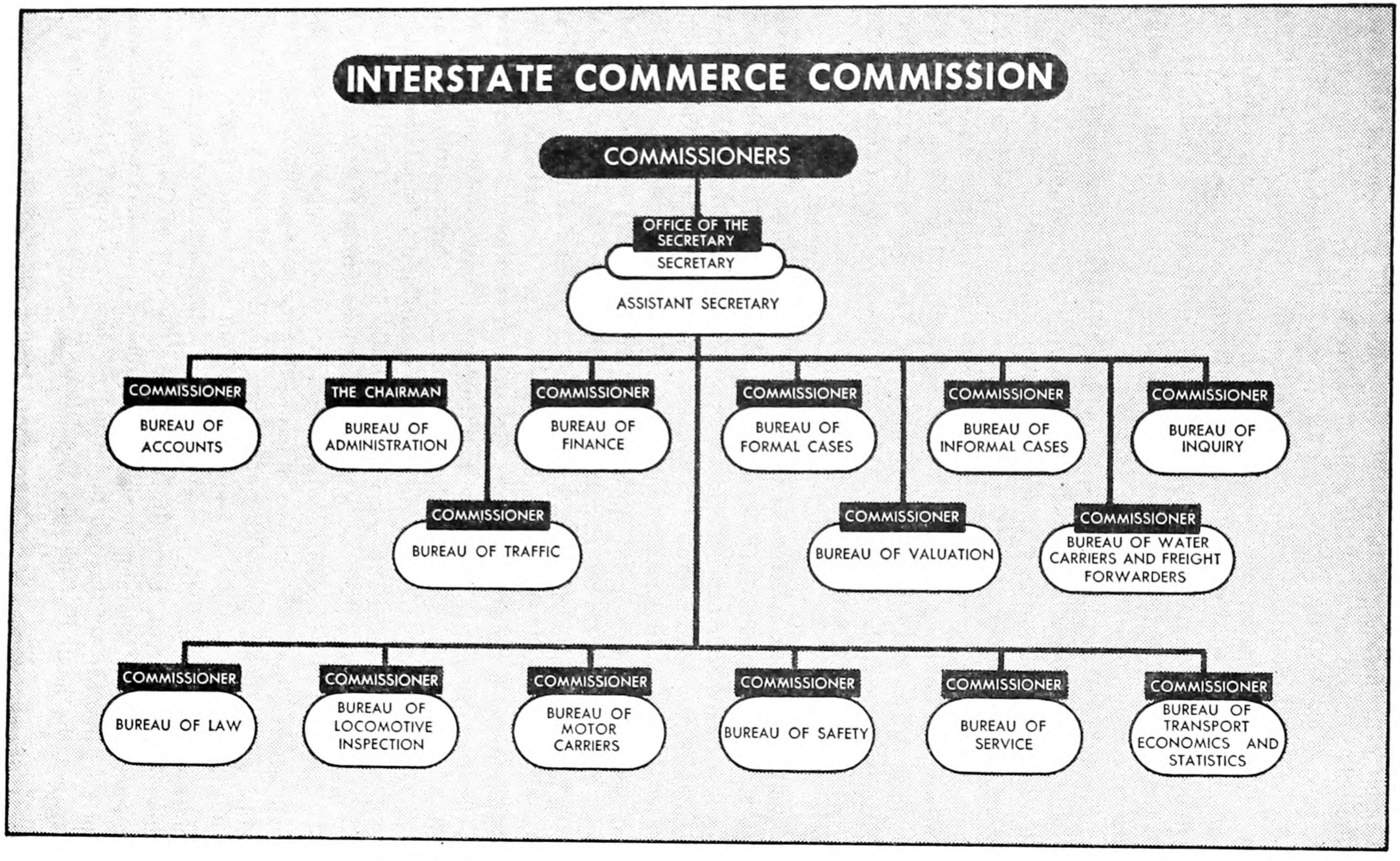
The Status of Commission Control. When it was initially established, the Interstate Commerce Commission was looked at askance by the railroads because of their intolerance of control by any agency whatsoever, and it was disapproved by lawyers and judges because its mixture of legislative, executive, and judicial powers violated a governmental tradition and ran counter to the doctrine of *laissez faire*. Early judicial interpretations of the powers of the commission greatly weakened it. The powers were restated in more specific language and expanded in subsequent statutes, however, and the commission eventually became well entrenched as a powerful instrument of government. It achieved a prestige perhaps second only to that of the federal courts themselves. By some it is now thought that the commission has become too conservative, too highly ritualized, and too deeply concerned with the welfare of the railroads where that conflicts with the broader welfare of the American public. Such a conception of the commission, indeed, seems to be entertained even by certain members of the Supreme Court.[10]

A major difficulty in government regulation of private enterprise, whether in this or in other fields, is that the dynamics of operation must come, not from the regulating agency, but from the corporations involved. The Interstate Commerce Commission does not directly operate railroads. The commission and the controlling statute merely prescribe a code of conduct within which the managers responsible for keeping the railroads going must function. To the extent that the commission and the statute succeed in keeping rates down, the purely economic incentive is removed to do anything more than operate in routine fashion. For a number of years the railroads seemingly operated as a kind of backward industry, unable to earn even the fair return on a fair value which the rates fixed by the Interstate Commerce Commission were supposed to permit. The subject is one about which experts disagree, however, for obviously the so-called dead hand of government regulation is not the only reason why the railroads have trouble competing effectively with other modes of transportation.

In wartime, the kind of control exercised by the Interstate Commerce

10. See C. Herman Pritchett, *The Roosevelt Court* (New York: Macmillan, 1948), pp. 177–80.

INTERSTATE COMMERCE COMMISSION



Commission is not sufficient to meet national needs. During World War I, after experimenting with partial regulation, the government took over altogether the operation of the nation's railroads. The roads were returned to private hands at the close of the war in spite of protests from advocates of permanent government operation. During the depression of the 1930's, a federal coordinator was appointed to facilitate cooperation among the railroads and to help them out of their difficulties. During World War II, while the roads remained technically in private hands, an agency known as the Office of Defense Transportation coordinated the railroads and other transportation agencies for war purposes.

Federal legislation attempts so to regulate the labor relations of the railroads as to prevent serious disturbances in transportation. A National Mediation Board operates as one of the major instruments of the government. When attempts at settlement fail, however, as they did in the summer of 1948, the government may find it necessary to protect the national interest by assuming direction of the railroads and securing injunctions against strikes and other labor disturbances. On that occasion, President Truman directed the Secretary of the Army to operate the railroads in the name of the United States government.

Political and Economic Power. The total capitalization of the railroads in the United States in 1947 was more than $20 billion.[11] The industry represents a tremendous concentration of economic power. Through the Association of American Railroads it operates a powerful lobby in Washington. One of its most important struggles in recent years has been its finally successful effort to stop the application of anti-trust laws to railroad activities. Since the 1890's the railroads have been subject to anti-trust legislation against combinations and conspiracies in restraint of trade as well as to the provisions of the Interstate Commerce Act. Contented with supervision by the Interstate Commerce Commission as at least the lesser of two evils, they have long held that anti-trust provisions should not apply to them. Proposed legislation to that effect occasioned hard battles at a number of sessions of Congress and was finally passed under Republican leadership in the summer of 1948, over the veto of the President. The implication of the struggle over the amending legislation seems to be this: that whereas the Interstate Commerce Commission exercises general supervision over the rate structure and other matters, it has neither the time nor the personnel to supervise in detail the working out of rate schedules; it must accept schedules worked out by railroad companies without interference from the commission even though these include abuses which anti-trust legislation is intended to prevent. Recently, for example, the state of Georgia instituted an anti-trust suit charging some twenty railroad companies with violations of the Sherman Act through rate-fixing combinations which discriminated against the South.[12] The new legislation, as was intended, prevents the

11. *Statistical Abstract of the United States,* 1949, p. 546.
12. See *Georgia* v. *Pennsylvania Railroad Co.,* 324 U.S. 439 (1945).

initiation of such suits. It is believed that shippers having grievances against railroads for unsatisfactory rates in particular categories will find it much harder to get satisfaction from the Interstate Commerce Commission, which in general trusts and indeed must trust the railroads to make up individual schedules, than it was to eliminate evils by anti-trust action through the Department of Justice or through private anti-trust suits.

Although the Interstate Commerce Commission has broad rate-making powers, it must to some extent take railroad operations as it finds them. It can do nothing, for instance, if it finds that more railroads operate in a particular area than are needed. Similarly, business of particular regions gets accustomed to the districting arrangements adopted for rate-making, so that those arrangements have to be maintained or can be changed only with great disturbance to the economy. Although unwittingly perhaps, the commission becomes an instrument for maintaining the status quo, as distinguished from an agency for readjusting railroad transportation to bring about the better distribution of business.

MOTOR TRANSPORTATION

The task of regulating railroads is difficult because regulations deemed necessary for the economic health of the carriers may curtail shipping altogether or drive it to other forms of transportation. Direct and indirect government aid to other forms of transportation may injure the competitive position of the railroads. In 1949 a railroad president protested to his stockholders that for twenty-five years government subsidies for highway, water, and air transport had been strangling railroad business. Government provision of highways for truck transportation, he protested, was a kind of subsidizing of the trucking business.[13] The effect of the automobile on railroad passenger traffic was apparent during World War II when the shortage of cars, tires, and gasoline drove much passenger traffic to the railroads, and again after the war when a great deal of passenger traffic was re-transferred to private automobiles.

As for private passenger cars, the federal government has made little attempt at regulation, even though a great deal of the traffic is in interstate commerce. It has, however, somewhat protected the competitive position of railroads by giving the Interstate Commerce Commission power to regulate interstate transportation by buses and trucks when they operate as common carriers or as contract carriers for hire. The commission has the power to review decisions of railroads to abandon lines altogether or to substitute motor freight or passenger service for that previously provided by rail. Motor transportation has so many loose ends out of the reach of the commission, however, that it is in no position adequately to integrate transportation by highway and by railroad.

13. William White, president of the Delaware, Lackawanna & Western Railroad, *New York Times*, May 11, 1949.

WATER TRANSPORTATION

Shipping by water has always played an important part in the commerce of the United States. While in early years ships flying foreign flags did much of the trans-ocean carrying, Americans built up as quickly as possible their own merchant marine both for international trade and for trade up and down our coasts and on our inland waters. American merchant ships using the waters of the United States and operating along our coasts have always been licensed by the federal government. The problems of water transportation and the interest of the government in it have always been different from the problems of land transportation and the interest of the government therein. Ocean shipping brings us into competition with the vessels of other countries over which our own government has no jurisdiction. We cannot control the subsidies which other governments pay their shipping interests, nor can we regulate working conditions on foreign ships. Differences in these matters may have a great deal to do with the ability of our ships to compete successfully with foreign ships in getting business. Many countries require that their own ships be used in trade in which they are interested. When the United States began delivery of supplies under the Economic Cooperation Act of 1948 the requirement was initially observed that at least fifty percent of the carrying be done in American ships. American shipping interests protested hotly when the ECA decided to make greater use of foreign ships because of the high cost of using our own.[14]

We cannot afford to permit American merchant ships to be driven off the oceans by foreign competition. From the short-run point of view it might be well to make use of foreign ships which operate at lower costs, but for the long pull we must have an adequate merchant marine to service our navy and war effort generally should war come. For this reason the government not only regulates shipping lines, as it does railroads, but it uses various devices for subsidizing shipbuilding and the carrying trade in merchant ships as well. In addition it owns and operates a considerable fleet of merchant vessels quite separate from the navy.

Control of Ships and Shipping. Our problems and activities connected with water transportation have been so diverse that it has been hard to coordinate the necessary controls. From 1936 until 1950 the most important governing agency was the United States Maritime Commission, an independent regulatory commission of five members. The Hoover Commission found that this body, in addition to exercising the regulatory functions usual to such agencies, had a great many important managerial responsibilities which ought to be integrated with the program of the administration and ought not therefore to be exercised by an independent agency. On the Hoover Commission's recommendations, President Truman in 1950 issued a reorganization order abolishing the Maritime Commission and dividing its

14. Hanson W. Baldwin, "Merchant Fleet Problems," *New York Times,* December 30, 1948.

functions between two new agencies, a Federal Maritime Board and a Maritime Administration, which were to be located in the Department of Commerce and operated through an Under Secretary of Commerce for Transportation. Describing the functions to be separated as they were then exercised by the Maritime Commission, President Truman noted that

> Under various acts the Commission regulates rates and services of water carriers, and protects shippers against unfair and discriminatory practices. This type of activity requires the deliberation and independence of judgment which a board or commission is especially well designed to provide. But at the same time the Commission is charged with the conduct of a variety of large and costly promotional and business-type programs demanding the prompt and vigorous administration for which experience both in Government and in private enterprise has demonstrated that a single executive is essential.[15]

The former type of activity was to be exercised by the Federal Maritime Board and the latter by the Maritime Administration. By this arrangement the business-type functions were to be integrated with the work of the Department of Commerce, an executive agency, instead of being left in an agency without responsibility to the President. These functions were further outlined as follows:

> The Maritime Commission has charge of the construction of merchant vessels for subsidized operators and for government account. It owns and maintains the largest merchant fleet in the world, consisting of 2,200 vessels aggregating more than 22,000,000 dead weight tons. It charters and sells ships and in time of war or national emergency requisitions and operates vessels for the government. It grants construction and operating differential subsidies to private shipping companies to maintain an active privately operated American merchant marine. It makes loans and insures mortgages to assist carriers in acquiring new vessels, and it conducts programs for training officers and seamen for the merchant marine. For the present fiscal year the performance of these functions will involve the expenditure of approximately $162,000,000 and the direction of an organization of 5,500 employees.[16]

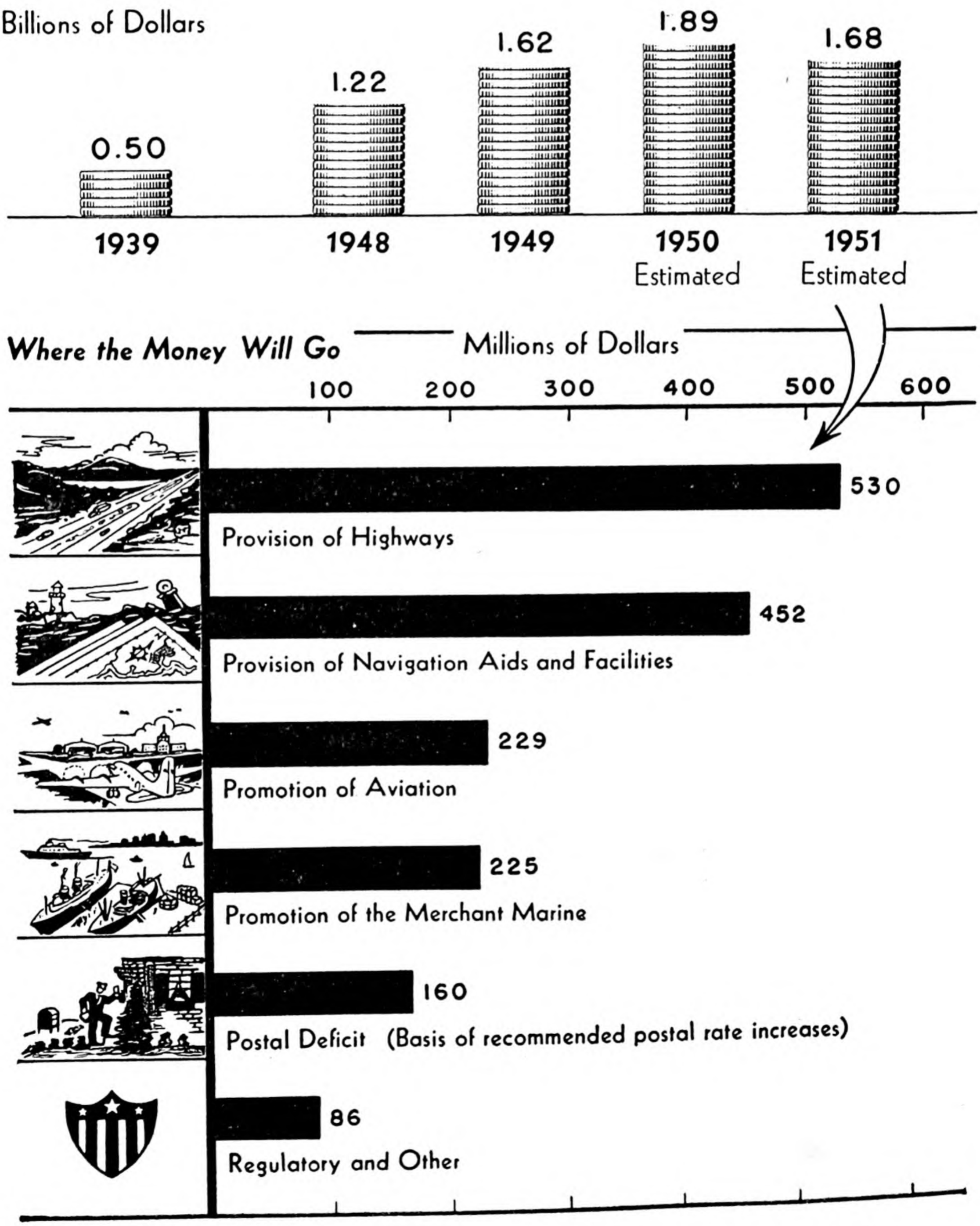
The problems of water transportation are too great and too involved to be solved merely by changes in administration. Although a fine merchant marine was built up during World War II, it has been declining since that time. Labor controversies, often communist-inspired, make trouble. The compromises between private enterprise and government ownership and operation have not yet solidified into a permanent and satisfactory pattern.

AIR TRANSPORTATION

Novelty of the Problem. The development of air transportation is even more recent than the development of motor transportation, and the problems of regulation are more novel, intricate, and difficult. The airplane is a military instrument of first magnitude. Although conventional military

15. *Congressional Record* (temporary daily edition), March 13, 1950, p. 3301.
16. *Ibid.*

minds were slow in recognizing its possibilities, it achieved such a place in World War II as to insure it a leading position in the plans for any war yet to come. The Department of Defense, therefore, with its operating Department of the Air Force, must see to it that the United States is equipped with an adequate force of modern planes, trained personnel, and plans for their use. Adequate equipment implies not merely bombers and fighters but transport planes for men and equipment wherever speed is a prime consideration.



BUDGET EXPENDITURES: TRANSPORTATION AND COMMUNICATION

The military and civil aspects of air power are closely bound together. Long distance transportation by air of passengers, mail, and light weight express has already become commonplace. Air transportation of freight in large quantities over long distances may be in the offing. The development of all forms of civil transportation has importance for military uses both because of the carry-over of experience and because the construction and operation of airplanes in civil transportation provides the principal use for aircraft in time of peace. Factories for the production of airplanes, landing fields which would be used in time of war, and various other facilities can be kept in production or ready for production at short notice much more effectively if regular civilian use can be made of them in peacetime.

Although the aircraft industry in the United States was enormously prosperous during World War II, it fell upon hard times after the war. Civil aviation has not yet expanded to utilize more than a small fraction of the facilities developed for war purposes. Private air transport on a mass production scale is not yet profitable unless subsidized. The costs are still too high to be borne by any large percentage of the business now carried on by railroads, ships, trucks, and buses. The predicament of an over-expanded aircraft industry at the close of the war was solved in part in the late 1940's as a result of the growing friction between the United States and Russia and the inability of the nations of the world to agree on control of the use of atomic energy for war purposes. As a means of self-protection, the government entered upon an armament program which again stimulated aircraft production. Apart from production for military uses, furthermore, it encouraged civil aviation by huge subsidies.

A prime method of subsidizing air transportation is to pay for the carrying of air mail at rates disproportionately high in comparison with the cost of carrying goods for private shippers. To that end, air mail postage is fixed by the government at rates far lower than the price of carriage which the government will have to pay, in order that the air transport lines may have something to carry. A postwar step taken to maintain the volume of air mail is described as follows:

> An abrupt downward trend in the volume of domestic air mail following demobilization of the armed forces threatened virtually to destroy the air mail service. This trend was halted in October, 1946 when, as a result of action by the Congress, the domestic air mail postage rate was reduced from 8 to 5 cents an ounce. In addition to halting the downward trend, the new rate brought about an immediate response from the mailing public, and over 771,000,000 pieces of domestic air mail were handled during the fiscal year 1947, as compared with approximately 221,000,000 during 1939, the last prewar normal year, at which time the 6-cent per ounce rate prevailed. While this increase has not yet reached the amount anticipated, the continued steady growth in volume is most encouraging.[17]

A subsequent reduction in foreign air mail postage rates was said to have brought an increase in volume of approximately one hundred percent.[18]

17. *Annual Report of the Postmaster General,* 1947, p. 15. The airmail postage rate was later raised to six cents.
18. *Ibid.*, p. 18.

Every new development which carries the promise of revolutionizing economic life, whether it be in railroads, motor vehicles, or aircraft, draws adventurous people who seek maximum benefits for themselves. The drive of self-interest is all the more effective when the prospect of government subsidies or government orders carries a measure of insurance against loss. The aircraft industry, like the other fields mentioned, has attracted the titans of big business, who seek to squeeze from its development every possible gain. Yet the interests involved are those of the public and not merely those of manufacturers and the giant operating companies which have quickly absorbed a major portion of the common carrier activities in the air. To protect the public interest and to secure directly the services needed by the government, it has been necessary to establish regulatory machinery and to adjust it from time to time as adjustment proves necessary.

Regulatory Machinery. The agencies of the Department of Defense let contracts for, purchase, and utilize through their own internal machinery such military aircraft as Congress authorizes them to acquire. In addition to purely military aircraft, they maintain the Military Air Transport Service, which operates a world-wide network of air transportation routes for the benefit of the several services of the Department of Defense.

Purely civilian aircraft are in an entirely different category. Civilian transportation varies all the way from one-seated private planes to giant passenger and express planes operated as common carriers over regular lines by huge corporations. Here the public interest is of infinite variety. To protect fliers, passengers in the air, and people and property on the ground, it is important that adequate restrictions be put on the licensing of pilots, that planes be required to conform to adequate safety standards, that flying and landing regulations be wisely made and enforced, and that research and experiment be carried on for the improvement of the new transportation industry. It is important that the right to operate as common carriers in the air or as contract carriers be allocated in terms of human needs and not merely in terms of the lobbying powers of big corporations.

Because the industry is new and is vitally connected with the military program of the government, regulatory machinery cannot conform completely to the pattern originally established for railroad regulation. The original railroad regulation aimed largely to prevent certain unlawful practices and to prohibit rates that were excessively high or were discriminatory. The dynamics of the railroad industry were expected to come from within the industry itself and not from the government. The revenue of the railroads was expected to be derived from the transportation of passengers and privately owned freight. If the government itself acted as a shipper, it did not in general consider this a reason for government subsidies. Rather, it expected equal or better treatment than that received by private individuals and corporations. As to air power, by contrast with railroads but comparably to water transportation, the government is involved also as a promoter. It spends on a tremendous scale for the deliberate purpose of expanding the industry.

It has been hard to construct adequate machinery for the dual purpose of promotion and restriction, and the process of experimentation is still under way. As of 1950, the machinery consisted primarily of a Civil Aeronautics Administration, an agency of the Department of Commerce which was concerned primarily with promotion and development, and a Civil Aeronautics Board, an independent agency conceived somewhat after the pattern of the independent regulatory commissions. Always in controversy is the question how far the regulatory agency should be subject to the play of political and economic pressures, as are agencies within the executive departments, and how far, on the other hand, they should be made immune from pressure through a degree of isolation, as are the federal courts and to some extent the independent regulatory commissions.

The Civil Aeronautics Administration concerns itself with experiment and development in various fields. It makes studies and tries to improve air navigation facilities. It concerns itself with the installation of landing devices, improvement in the use of radio and markers, better construction of airports, and various other items. It operates communications facilities at various points outside the United States. It makes studies and attempts to improve the organization of air routes throughout the country. It certifies flying schools and aids in working out standards for the licensing of pilots.

The Civil Aeronautics Board. Overlapping of functions between the Civil Aeronautics Administration and the Civil Aeronautics Board is indicated by their tendency to claim jurisdiction and achievement in the same fields. The board, however, is called an independent agency. It is composed of five members appointed by the President with the consent of the Senate. It is intended to have a measure of immunity from political and economic pressures so that it may perform more adequately the functions of rule-making, adjudication, and investigation. The board passes on applications for "certificates of public convenience and necessity" which are necessary if an airline is to operate as a common carrier under the American flag. It issues "permits" which foreign carriers must have to operate in the United States. It prescribes or approves transportation rates. It fixes the rates at which mail will be carried for the government. It surveys the continuing relations between carriers, and it may approve or disapprove contracts, agreements, interlocking relationships, consolidations, mergers, and acquisitions of control. If a company already using a route performs its services inadequately, the board may terminate its franchise at the end of the license period and transfer the franchise to other hands. The board also prescribes safety rules and regulations, including those determining standards for the issuance of airmen's certificates and certificates of airworthiness for aircraft. It investigates and reports on accidents involving civil aircraft. It works with the Department of State in the negotiation of agreements with foreign governments for the development of various aspects of air transportation.

The exercise of power by the Civil Aeronautics Board involves powerful interests and subjects it to great pressures in spite of its nominal independence. After the close of World War II, a great many veterans sought to

enter the air transport business on a small scale. Their applications meant counter-pressure from the powerful transport lines already in operation. Airlines often resent the safety regulations prescribed by the board. Early in 1948, the then chairman of the board, James M. Landis, was denied reappointment after it had been assured by President Truman, presumably because of opposition from some of the interests involved. He discussed the opposition in part as follows:

> Pan American Airways, which is seeking coast-to-coast routes in Continental United States, spent nearly $1,000,000 in advertising to line up public opinion for its plan. The case then came before the CAB. It struck me as unethical for an airline to use this kind of pressure tactics on the board, and I said so in a report. Pan American, I am sure, didn't like that. But they did stop their high-pressure advertising.
>
> In another instance, United Airlines was resentful because I opposed their purchase for $1,500,000 of the Denver route of Western Airlines. Western had received this route from the CAB for nothing only nineteen months previously. It was my feeling that the certification belonged to the public and should not be sold for $1,500,000. United contended that they would do the paying and not the public. I disagreed.[19]

Pressures which fail to secure results from an administrative agency may nevertheless have repercussions in Congress. Continuous complaint from hostile critics tends to discredit the agency with Congress. This may be one reason why for a considerable period Congress appropriated only $10,000 a year for each board member's salary, although a statute in force at the time authorized $12,000. It is no easy task to secure men of ability and integrity for such positions. After he decided against reappointing Landis, President Truman nominated a major general from the Air Force, asking Congress at the same time to pass a bill permitting the nominee to go on collecting his current government salary, which from all sources amounted to more than $15,000 a year. Such an action would have further extended military influence over civil airpower. Whether for this reason or because of the clamor likely to be raised by the discrimination in terms of salary, Congress refused to enact the measure and the nominee refused to take the position.

Although the position was eventually filled, and in 1949 the salaries of the members of the board were raised to $15,000 along with the raising of other salaries, dissatisfaction with the machinery still remains. It is likely to continue, not primarily because of defects in the machinery or inadequacies of the personnel, but because of the difficulties of the situation and the character of the pressures involved. We can have stable government only when we have stable situations. When fundamental conditions are in process of rapid change, governmental machinery is likely to undergo rough treatment and must be readjusted from time to time to changes in circumstance.

19. *New York Times,* January 4, 1948 (as reprinted from the *New York Times* of January 3, 1948).

Administrative Discretion and Judicial Review. One type of administrative difficulty, critical here and at least potentially in various other regulatory situations, is illustrated by a sharp division in the Supreme Court. The justices disagreed over the scope of the power of the courts to review decisions of administrative tribunals when those decisions are non-judicial in character to the extent that the President has power to modify them. Sensing the danger of error or of unjust treatment by the Civil Aeronautics Board in deciding such questions as whether or not a company shall be permitted to operate over a route which it seeks, Congress provided that such determinations by the board should be subject to judicial review. Knowing also that where foreign affairs were involved the question should sometimes be decided by considerations known only to the President, Congress authorized the President to approve or disapprove such orders of the board. Determinations by the President which are made for political considerations cannot be made subject to judicial review. The defeated party of two transport lines which had sought the same overseas franchise appealed to a federal court a CAB decision which the President had approved. The basic question was carried on to the Supreme Court. Five members of the Court, a bare majority, held that because the discretion of the President was involved a federal court could not review the board's decision. Four dissenting members contended that the right of review which Congress had given was needed to protect the rights of private parties and that the chance that the President might refuse should not be held to obliterate the right of review and thereby deny protection from any injustice which might be done by the board.[20] The question was highly technical, but it is upon such technical questions that final regulatory decisions often turn.

ELECTRIC POWER AND NATURAL GAS

Electricity. Throughout the first half of the twentieth century, the use of electricity has expanded steadily and rapidly. Early regulation was undertaken largely by the several states, but the states were handicapped particularly in the control of rates wherever transmission lines passed from one state to another, thereby operating in interstate commerce. Many communities, dissatisfied with the rates they had to pay, discussed or even attempted public ownership and operation of electric plants and transmission lines. Such operation was difficult, however, partly because it was on a small scale. One of the major arguments for the development and distribution by the federal government of electric power in the Tennessee Valley area was that it would demonstrate the feasibility of marketing electricity at low cost and would thereby provide a yardstick for the value of services rendered by private corporations. This was no doubt one, though only one, of the reasons why the federal government during the New Deal period undertook the Tennessee Valley project. Provision of electric power was one of

20. *Chicago and Southern Airlines* v. *Waterman Steamship Corporation,* 333, U.S. 103 (1948).

the many reasons, furthermore, for the building of Hoover Dam and other important dams erected in western rivers by the federal government. Provision of electric power in large quantities constitutes one part of the long-discussed but not yet undertaken St. Lawrence River project.

Beginning in the New Deal period, the federal government has expanded the use of electricity by making loans to encourage the construction of transmission lines and the purchase of electrical equipment in agricultural areas. The Rural Electrification Administration, now an agency of the Department of Agriculture, makes self-liquidating loans providing one hundred percent financing for the construction of rural electric facilities, with a restriction that in making such loans preference shall be given to public bodies, cooperatives, and non-profit or limited dividend associations. Several hundred thousand miles of power lines and related facilities have been constructed with such support.

The leading regulatory agency in this field is the Federal Power Commission, another of the independent regulatory commissions. An important task of the commission is to administer the provisions of the Federal Water Power Act which are calculated to protect for the American people their rights in the water power potential of navigable streams. New dams in such streams can be erected by private parties only after the Federal Power Commission has issued a license which reserves broad powers to the federal government. The commission investigates and surveys water power resources in order to insure that developments are undertaken in such a way as to provide maximum benefit from existing resources. The commission also regulates rates and other aspects of the transmission of electric power in interstate commerce. In this respect, it operates much like the Interstate Commerce Commission in regulating the rates of interstate railroads. As a result of its operations, interstate commerce has ceased to be a no-man's-land into which electric power companies can escape regulations by going beyond the jurisdictions of individual states.

Natural Gas. The Federal Power Commission also regulates the sale of natural gas in interstate commerce. Beyond that, its permission must be secured before additional pipe lines can be constructed to carry gas over which the commission has jurisdiction. In other words, a company must secure from the commission a certificate of public convenience and necessity before it can lay out new lines. The commission attempts to exercise its authority in terms of the welfare of the communities affected. If a community is already adequately served, it will not permit the construction of competing facilities. It will reject an application, furthermore, if the construction of a new line seems likely to render inadequate the supply of gas already allocated to another community. Such action is described as follows in an annual report of the commission:

> The Commission, in February 1946, dismissed the application of Panhandle Eastern Pipe Line Co. for a certificate to enable it to sell up to 50,000,000 cubic feet a day to the Ford Motor Co. The Commission found that sales

> to Ford would cause impairment of the company's service to its present customers. The Commission subsequently authorized an arrangement between the Panhandle company and Consumers Power Co. of Michigan whereby surplus gas became available for storage in the nearly exhausted gas fields in Michigan to meet the winter peaks on the latter system.[21]

Another such action was described as follows by a newspaper of an interested community:

> Baltimore's chance of getting natural gas received a set back, at least temporarily, through an opinion issued today by the Federal Power Commission in Washington.
>
> By a 3-to-2 vote the Commission ruled that the Tennessee Gas Transmission Company had not proved it has sufficient gas over the period of the next twenty years to justify the extension of its lines from the Texas gas fields to the Appalachian area. The certificate of public convenience and necessity which the company requested was denied.[22]

The Federal Power Commission, like other such regulatory agencies, operates amid tremendous pressure from interested communities and private corporations. Its effectiveness depends upon its maintenance of public confidence and on protection by other government agencies when its powers are challenged or when attempts are made to curtail them. The Supreme Court has recently upheld the power of the commission to prescribe accounting methods even of companies engaged only in intra-state distribution of gas which has by some other company been brought in from another state.[23] In April, 1950, President Truman vetoed a bill which would have denied the commission power to fix rates on gas sold by producers to interstate pipeline companies. The veto marked the culmination of a struggle of southern gas producers to escape price regulation with opposition from northern consumers, who interpreted the move as one to put them at the mercy of the gas producers. In vetoing the bill President Truman argued that regulation was necessitated by the method of getting gas from the producer to the consumer:

> Unlike purchasers of coal and oil, purchasers of natural gas cannot easily move from one producer to another in search of lower prices. Natural gas is transported to consumers by pipe lines, and is distributed in a given consuming market by a single company. The pipeline companies, and in turn the consumers of natural gas, are bound to the producers and gatherers in a given field by the physical location of their pipe lines, which represent large investments of funds, and cannot readily be moved to other fields in search of a better price.[24]

He thought the gas interests had no reason to fear the exercise of the lawful authority of the Federal Power Commission.

21. *Twenty-Sixth Annual Report of the Federal Power Commission*, 1946, p. 10.
22. Baltimore *Evening Sun*, September 30, 1948. Service was, however, extended to this area at a later date.
23. *Federal Power Commission* v. *East Ohio Gas Co.*, 70 S.Ct. 266 (1950).
24. *Congressional Record* (temporary daily edition), April 18, 1950, p. 5368.

COMMUNICATION

Telephone and Telegraph. The last hundred years has seen a development in media of communication undreamed of by the framers of the Constitution. The telegraph dates from the middle of the nineteenth century and television came into commercial use in the 1940's. Between these came the trans-oceanic cable, the telephone, radio, and tremendous expansion of the nation's press. With this development has come extended regulation and supervision. The construction of telegraph lines often followed the railroads and, although the framers of the Constitution foresaw no such instrument when they drafted the commerce clause, there was no difficulty in classifying the operation of telegraph lines from one state to another as interstate commerce. Similarly, the operation of cable lines to countries across the sea was classified as foreign commerce. The classification of the telephone, which came into general use during the last third of the nineteenth century, followed that of the telegraph. It was not until the regulation of railroads through the Interstate Commerce Commission was well under way that similarly comprehensive regulation of telephone and telegraph operation was undertaken by the federal government. It was perhaps only natural that for a time such regulation should be placed in the hands of the Interstate Commerce Commission.

As with the railroads, the federal government regulates the telephone and telegraph rates, various other financial operations, and the extension or curtailment of service. The business had become so intimate a part of the life of the country that, during World War I, the government took over the management of telephone and telegraph as well as of railroads. During World War II, it maintained integrating supervision of all instruments of communication. In the meantime, with the establishment of the Federal Communications Commission in 1934, jurisdiction over telephone and telegraph was transferred from the Interstate Commerce Commission to that agency.

Radio. Radio came into general public use during the second quarter of the twentieth century. Unlike the earlier forms of electrical communication, on which a great deal of experimentation was done before the federal government began comprehensive regulation, the welfare of the United States as a nation and the interests of the American people were so intimately involved in the development of radio that federal supervision was deemed necessary almost from the beginning. Whereas a railroad could be permitted to acquire a permanent right of way across the country, it was not thought desirable to permit any broadcaster to acquire permanent possession of one or more of the limited number of broadcasting wave lengths. Indeed, it was deemed undesirable to permit any broadcaster, even for a short period, to use a wave length without such supervision as could be insured by licensing arrangements. Partly because the industry was new and rapidly changing and because the legal problems were new, planning a permanent scheme of regulation was extremely difficult. During the late

1920's, Congress experimented with a federal radio commission of narrowly restricted powers. It proved inadequate, but it provided the experience necessary to the drafting of more satisfactory legislation. Finally, by the Communications Act of 1934, Congress established the Federal Communications Commission, gave it broad regulatory jurisdiction over the field of radio, and transferred to it from the Interstate Commerce Commission the control of telephone and telegraph as well.

In addition to handling the conventional type of regulation of telephone and telegraph previously practiced by the Interstate Commerce Commission, the Federal Communications Commission controls radio in many respects which are novel by comparison with regulation in other fields. It licenses all broadcasters in the United States and operating under the American flag from the lowly amateur to the most powerful station in the country. It issues the licenses only for limited periods and appraises the conduct of each broadcaster under the Federal Communications Act to determine its right to a renewal of his license. It apportions the available wave lengths to provide some clear channels for powerful broadcasters and other channels for use at the same time by less powerful stations in many localities. It allots wave length areas for standard broadcasting, short wave broadcasting, frequency modulation, and television.

All these activities call for enormous technical knowledge on the part of the commission members or their staff. They call for the exercise of imagination as to scientific developments which lie ahead. They call also for sound judgment in matters of public policy about which reasonable men may easily differ. The task of the commission is further increased by the fact that in radio as in airpower, as previously discussed, powerful corporations with financial interests in the activities of the commission find ways of exerting pressures upon it. The huge broadcasting chains wield an influence upon the public and therefore upon Congress. They succeed in making themselves felt in matters which fall within the jurisdiction of the commission. These pressures keep the commission in hot water and result in a great deal of public criticism which may or may not disclose the real motives lying back of accusations and charges. The commission is made the victim from time to time of congressional investigations which reflect, not a sound concern about the public welfare, but a desire to exert inquisitorial power and to discredit the commission for its failure to yield the pressures of one kind or other.

The difficulties of regulation are enhanced by the continuing impossibility of drawing a line between the technical matters which ought to be left to the commission because of its presumed technical competence and the questions of policy on which Congress ought to intervene from time to time in order to see that its will is adequately carried out by the commission. An illustration is provided by the controversy over the maximum strength of the broadcast signal to be permitted any of the major broadcasting stations. In general, the maximum has been fifty thousand watts for standard broadcasting. The commission experimented for a time, however, on one station

with five hundred thousand watts. Thereafter, in various proceedings extending over more than two years, it held hearings to determine its future policy. A great deal of information was collected about the areas in which particular stations could be heard and the interference caused by increase in strength. Particular stations seeking more power and more listeners, particularly in rural areas wishing better service, argued for an increase in the power of chosen stations. Other witnesses, denouncing the development of monopoly in radio, argued for the restriction of power so that more stations could have access to the air. In April, 1948, before the commission was ready to announce a decision, a Senate committee began hearings on a bill "to limit A.M. radio broadcast stations to 50,000 watts and to provide for duplication of clear channels." Resenting the criticism of congressional interference with the commission in technical matters, Senator Tobey introduced in the hearings the following statement:

> I believe that it would be well, for the record, to clear up at least one of the many charges that have been made about this bill. It is that Congress, in acting on this bill, is interfering with the administrative duties of one of its agencies. I think it is about time that everybody understand the Federal Communications Commission, like a number of other agencies, is an arm of Congress and carries out functions which the Congress has directly delegated to it by law. Congress has not only the right, but the duty, to change those functions from time to time as it determines public policy requires.
>
> The agency does not lay down public policy; the Congress does.[25]

Censorship. In addition to difficulties arising from pressures from interested parties and from lack of a clear line of jurisdiction between Congress and the commission, other difficulties arise over issues of censorship. The Communications Act specifies that nothing therein shall be understood or construed to give the commission the power of censorship and that no regulations shall be promulgated by the commission which shall interfere with the right of free speech by radio. At the same time, it provides that "no person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication." Furthermore, it provides that the commission shall have authority to suspend the license of any operator upon proof sufficient to the commission that he has transmitted "communications containing profane or obscene words, language, or meaning." It also provides that the allocation of radio facilities and the renewal of licenses shall be measured by the condition that the "public convenience, interest, or necessity will be served thereby." So it is that while the commission is specifically denied the power of censorship, it is at the same time required to exercise judgment with respect to broadcasting stations which is virtually the exercise of a censorship power. So it is that broadcasting stations find it advisable to restrict the language of performers lest station licenses be jeopardized. So it is, for

25. *Limit Power of Radio Stations,* Hearings, Senate Committee on Interstate and Foreign Commerce on S. 2231, 80th Cong., 2d. sess., p. 4. Congress did not act on the bill.

example, that whereas under the pressure of advertisers, broadcasters frequently permit devious nauseous discussions of laxatives of various sorts, any mention of the word "diaper" in any joke was, for many years, strictly forbidden by the National Broadcasting Company. The elimination of that particular ban resulted in the following headline in the *New York Times*: "NBC Permits the Use of Diapers — In Jokes, That Is, as Ban Is Eased."[26]

The general public and even members of Congress [27] tend to underestimate the difficulties of the commission in carrying out the instructions of the Communications Act. The exercise of censorship over political speeches and the allocation of time to rival candidates and rival political parties involve delicate problems. While radio is expected to serve the public by broadcasting on public issues, it is not expected to show partiality in political matters. As between the two major political parties, the commission seeks approximately equal allocation of time. Minor parties get some broadcasting time but they fare somewhat less well than the major ones. Holding that stations should strive for fairness in airing controversial issues, the commission has issued a report for their guidance which is summarized in part as follows:

> The Commission believes that under the American system of broadcasting the individual licenses of radio stations have the responsibility for determining the specific program materials to be broadcast over their stations. This choice, however, must be exercised in a manner consistent with the basic policy of Congress that radio be maintained as a medium of free speech for the general public as a whole rather than as an outlet for the purely personal or private interests of the licensee. This requires that licensees devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations and that such programs be designed so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community. . . . Only insofar as it is exercised in conformity with the paramount right of the public to hear a reasonably balanced presentation of all responsible viewpoints on particular issues can such [licensee] editorialization be considered to be consistent with the licensee's duty to operate in the public interest. For the licensee is a trustee impressed with the duty of preserving for the public generally radio as a medium of free expression and fair presentation.[28]

Of peculiar difficulty is the problem of granting or denying radio time to atheists and others who advocate beliefs inconsistent with those of the mass of the people. Controversy over such borderline issues tends to confuse rather than clarify the proper limits of the Commission's jurisdiction.

Censorship of radio, as of all other means of communication, may of course be resorted to in wartime. Such power was broadly exercised during World War II. Furthermore, the government may operate radio facilities for its own purposes or lease time on the air for broadcasting. The so-called Voice of America, sponsored by the Department of State, undertakes

26. *New York Times,* November 29, 1947.
27. See *Investigation of Port Huron Decision and Scott Decision,* House Report No. 2461, 80th Cong., 2d. sess.
28. *Fifteenth Annual Report, Federal Communications Commission,* 1949, p. 33.

the complicated task of building up good will toward the United States in foreign countries. During World War II, the government maintained an effective monitoring service by means of which it listened to broadcasts from all parts of the world for information which might be helpful in the conduct of the war. In short, radio broadcasting touches American life at so many points and so vitally that governmental action with respect to it must be equally comprehensive.

GENERAL PROBLEMS OF REGULATION

Regulatory Commissions. The several sections of this chapter illustrate the point that transportation and communication are subjects peculiarly of government concern. The necessity for regulation in the public interest is generally recognized. The type of agency most used by the federal government for this purpose is the regulatory commission, made up of varying numbers of men appointed by the President with the consent of the Senate and having individual terms expiring at different dates. Whether as a result of statutory provision, as with most of the commissions, or by executive order, as with the Civil Aeronautics Board, the attempt is made to give commission members some immunity from executive interference. It is assumed that they are to some extent professional appointees and should not be subject in the same degree to the political influences which play upon agencies of the executive branch of the government. So far as the commissions engage in independent policy making, their independence creates problems of integration with the program of the President, which may be shaped after a different pattern. In any event, the diverse patterns of regulatory activity of the several commissions cannot be brought into harmony with one another by presidential supervision except as time permits a particular President to man the several commissions with members of his own way of thinking. If we allow for the relatively frequent bad guesses which any President is likely to make in the selection of personnel, we find that presidential terms of average length are likely to be well along toward completion before the several commissions are manned by persons of his choosing. In spite of his long period of service, President Franklin D. Roosevelt never succeeded in bringing the Interstate Commerce Commission around to his way of thinking. Restriction of presidential authority is all to the good as it prevents the exertion of presidential influence in matters which ought to turn on the integrity of appointees, but it is bad as it prevents the utilization of common experience and the cooperation of governmental agencies to promote the public welfare.

Relations of the commissions to Congress also create problems. While it is true that each commission is in a sense an arm of Congress, created to do its will better than Congress itself could do it, the commission can function properly only if permitted to act in terms of prescribed standards without congressional interference. It cannot do its work well if it is constantly bedeviled by particular congressmen or hostile congressional committees

expressing resentment at the refusal of commissioners to yield to the importunities of their constituents. There is disagreement as to the extent to which members of the commissions themselves should be experts on the subjects they are expected to regulate and the extent to which, on the other hand, they ought to be merely employers of experts who can provide technical information but will leave decisions to the commissioners. Certain it is that the work of the commission must reflect not merely technical knowledge but broad understanding of the relation of technical matters to the public welfare. Commissioners must be statesmen and diplomats as well as experts. It may be easier for statesmenlike commissioners to employ experts in railroad transportation, aircraft, or radio development than for an expert commissioner to hire workers with the skills of statesmen and diplomats.

There are also perennial problems of judicial review. Legislators feel uneasy about authorizing commissioners to decide questions of private right unless the decisions on at least some of the more critical problems can be referred to the courts for allegedly unbiased review. As was said in an earlier chapter, the tendency is to permit commissions to decide finally all questions of fact but to authorize appeal to the courts where the questions in dispute are matters of law. When questions of fact and law are inextricably mixed, the question of judicial review remains a difficult one.

The Control of Rates. The control of rates is one of the more important problems of government regulation of transportation and communication. Attempts at control have resulted for more than half a century in hard struggles between government on the one hand and private owners and operators on the other. In the Granger cases of 1877, the spokesman for the Supreme Court remarked that where government had the power to regulate rates, the possibility of legislative abuse was a matter for reference not to the courts but to the people who elected the legislators. The states found that rate regulation, if it was to be effective, had to be done by agencies which were continually in existence, as state legislatures were not, and which had more expert knowledge and more time for the subject than the legislatures had. The protests of owners and operators against unrestricted commission control, first in the states and then in the federal government, led the Supreme Court gradually to shift its ground and assert the right of judicial review. The principle announced by the Court in measuring the validity of rate regulations was that regulations should permit the business to earn a fair return on the fair value of the property. The approximate fairness of a given rate of return was relatively easy to discover by reference to the prevailing rate of interest and other known considerations. Discovering the fair value on which the fair rate of return was to be based, however, was another matter. Railroads, steamship lines, and telephone companies are not bought and sold in the market place in such a way as to demonstrate market value. What a regulated business is worth to the owners is measured in part by its earnings. Since the earnings depend

in part upon the rates to be fixed by government, it is not reasonable to base future rates on a value which is the product of current rates.

The Supreme Court was slow in coming to grips with the question. In an extremely cautious statement in the case of Smyth *v.* Ames,[29] decided in 1898, it declared that in measuring value a large number of considerations should be taken into account. They include original cost of construction, improvement costs, market value of stocks and bonds, present as well as original cost of construction, probable earnings, operating expenses, and other considerations. It did not indicate what weight was to be given in each situation to each of these considerations. Future valuation decisions therefore were battles in which government agencies on the one hand and the regulated businesses on the other sought to juggle the several considerations for their own benefit. In any event, exact figures on any of these factors were usually not to be had. In the doubtful event that agreement on principle could be attained, therefore, disagreement on fact still remained.

For these reasons, the first third of the twentieth century was characterized by endless valuation litigation. Gradually, a minority of judges and certain commissioners began to insist on the measurement of value by what they termed prudent investment, as distinguished from alleged actual cost or hypothetical cost of reproduction at the time of the controversy. They contended that the adoption of such a basis for measuring value would be fair to all parties concerned and would eliminate a great deal of costly litigation and promote efficient regulation. Utility corporations and their lawyers fought the adoption of the principle. The controversy continued into the New Deal period, which reflected a new attitude toward the rights of property. To the average New Deal spokesman, promotion of the general welfare and the welfare of consumers in particular was no less important than regulating so as to insure corporations a fair return on the fair value of their property. The replacement of the old Supreme Court by Roosevelt appointees brought the new attitude to the bench. Whereas the pre-New Deal Court had seemed primarily concerned with the rights of property, the succeeding group of judges shifted emphasis variously to the rights of consumers or of the public at large. The transition came in connection with decisions involving rates charged by natural gas as prescribed by the Federal Power Commission. In a case decided in 1942, Chief Justice Stone, speaking for a majority of the Court, held that the Federal Power Commission had a broad area of freedom in its method of determining reasonable rates.

> The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process

29. 169 U.S. 466.

> have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.[30]

Even this broad statement of leeway was considered insufficiently broad by three new members of the Court, Justices Black, Douglas, and Murphy. While they concurred in the judgment in the case, they took the occasion in a concurring opinion to assert a new body of doctrine which was phrased in part in the following statements:

> In so far as the Court assumes that, regardless of the terms of the statute, the due process clause of the Fifth Amendment grants it power to invalidate an order as unconstitutional because it finds the charges to be unreasonable, we are unable to join in the opinion just announced.
>
> Rate-making is a species of price fixing. In a recent series of cases, this Court has held that legislative price-fixing is not prohibited by the due process clause. We believe that in so holding, it has returned in part at least to the constitutional principles which prevailed for the first hundred years of our history. . . .[31]
>
> Price fixing like other forms of social legislation, may well diminish the value of the property which is regulated. But that is no obstacle to its validity. . . .[32]
>
> The consumer interest cannot be disregarded in determining what is a "just and reasonable" rate. Conceivably a return to the company of the cost of the service might not be "just and reasonable" to the public. . . .[33]
>
> The investor interest is not the sole interest for protection. The investor and consumer interests may so collide as to warrant the rate making body in concluding that a return on historical cost or prudent investment though fair to investors would be grossly unfair to the consumers. The possibility of that collision reenforces the view that the problem of rate making is for the administrative experts not the courts and that the ex post facto function previously performed by the courts should be reduced to the barest minimum which is consistent with the statutory mandate for judicial review. That review should be as confined and restricted as the review, under similar statutes, of orders of other administrative agencies.[34]

By 1944, additional changes in Supreme Court personnel had permitted the minority of 1942 to become the majority. In another case involving the regulation of gas rates by the Federal Power Commission, Justice Douglas spoke for the majority of the Court. He restated the proposition that even if a regulation reduced the value of property, this did not mean that the regulation was invalid. It meant rather that fair value was the end product of the process of rate making and not its starting point. Rates could not be made to depend upon "fair value" when the value of the going enterprise depended on earnings under whatever rates might be anticipated. He reiterated the statement of the majority of the Court in the earlier case that,

30. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942).
31. *Ibid.*, p. 599 32. *Ibid.*, p. 603. 33. *Ibid.*, p. 607. 34. *Ibid.*, p. 608.

in fixing rates, the commission was not bound to the use of any single formula or combination of formulae. When the statute required that rates should be "just and reasonable," it was the result reached and not the method employed which was controlling. Furthermore,

> If the total effect of the rate ordered cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of the expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a conviction showing that it is invalid because it is unjust and unreasonable in its consequences.[35]

The new line of decisions did much to free the regulatory commissions from the restrictions of judicial control over rate-making which they had experienced for more than half a century. Judicial review, in terms of the constitutionality of particular rates and rate-making procedures, could no longer be used to the same extent by corporations seeking to fight off the restraining hand of government. It was still possible, of course, for Congress to write restrictions into regulatory statutes, and Congress does so, but its restrictions tend to be less drastic than those previously applied by the Supreme Court. Further, the more liberal attitude of the Court toward the exercise of governmental power applies in its interpretation of statutes as well as its interpretation of the Constitution. Whether the standard involved is prescribed by the Constitution or by a statute, the Court now tends to look to the interests of all parties involved rather than to the interests merely of the regulated corporations.

The changing attitude toward rate-making further reveals the process of change in attitude which goes on continually as to the proper area of governmental operation in many other spheres. The fact that a change has recently taken place does not mean that the now prevailing attitude is permanently fixed. In a dissenting opinion filed in the case last cited above, Justice Jackson, with at least partial concurrence of Justice Frankfurter, argued that when statutes required that rates should be just and reasonable the Court should, in appraising the justice and reasonableness of gas rates, take into account other interests than those of producers and current consumers. Among other things, it was an important fact that the supply of natural gas was being rapidly depleted.

> Limitation of supply . . . brings into a natural gas case another phase of the public interest that to my mind overrides both the owner and the consumer of that interest. Both producers and industrial consumers have served their immediate private interests at the expense of the long-range public interest. The public interest, of course, requires stopping unjust enrichment of the owner. But it also requires stopping unjust impoverishment of future generations.[36]

35. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).
36. *Ibid.*, pp. 656–57.

In the light of the long range public interest in preserving the supply of natural gas, Justice Jackson would have interpreted the statute in such a way as to require readjustment of rate schedules which prescribed relatively high figures for domestic consumers and low ones for industrial consumers. If the readjustment meant that industrial consumers would shift to some other fuel, he would have deemed this result desirable as a means of conserving the nation's heritage in natural gas. Although the majority of the Court did not follow him, this fact does not necessarily mean that statement of the idea was unimportant. Most doctrines first come into general consideration by way of minority statements. Whether or not this particular statement of principle is eventually read into the body of law, its assertion indicates the way in which the body of law in this and other fields takes on new configurations. Moreover, the fact that a principle has been enunciated, even if only a minority opinion, with an ultimate chance of becoming law, illustrates the way in which law develops in the regulation of transportation and communication and in other areas as well.

References

Robert E. Anderson, *The Merchant Marine and World Frontiers* (Cornell Maritime Press, 1945).

William Beard, *Regulation of Pipe Lines as Common Carriers* (Columbia University Press, 1941).

Robert E. Cushman, *The Independent Regulatory Commissions* (Oxford University Press, 1941).

Paul T. David, *The Economics of Air Mail Transportation* (Brookings, 1934).

Charles L. Dearing and Wilfred Owen, *National Transportation Policy* (Brookings, 1947).

Marshall E. Dimock, *Developing America's Waterways; Administration of the Inland Waterways Corporation* (University of Chicago Press, 1934).

Carson S. Duncan, *A National Transportation Policy* (Appleton-Century, 1936).

Carl J. Friedrich and Jeanette Sayre, *The Development of the Control of Advertising on the Air* (Harvard University Press, 1940).

Carl I. Hovland, Arthur A. Lumsdaine, and Fred D. Sheffield, *Experiments on Mass Communication* (Princeton University Press, 1949).

E. R. Johnson, *Government Regulation of Transportation* (Appleton-Century, 1938).

William N. Leonard, *Railroad Consolidation under the Transportation Act of 1920* (Columbia University Press, 1946).

Carl MacFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission 1920–1923* (Harvard University Press, 1933).

Harold G. Moulton, *The American Transportation Problem* (Brookings, 1933).

C. Herman Pritchett, *The Roosevelt Court* (Macmillan, 1948).

Thomas P. Robinson, *Radio Networks and the Federal Government* (Columbia University Press, 1943).

I. L. Sharfman, *The Interstate Commerce Commission* (The Commonwealth Fund, 5 vols., 1936).

J. C. Bonbright, *Public Utilities and the National Power Policies* (Columbia University Press, 1940).

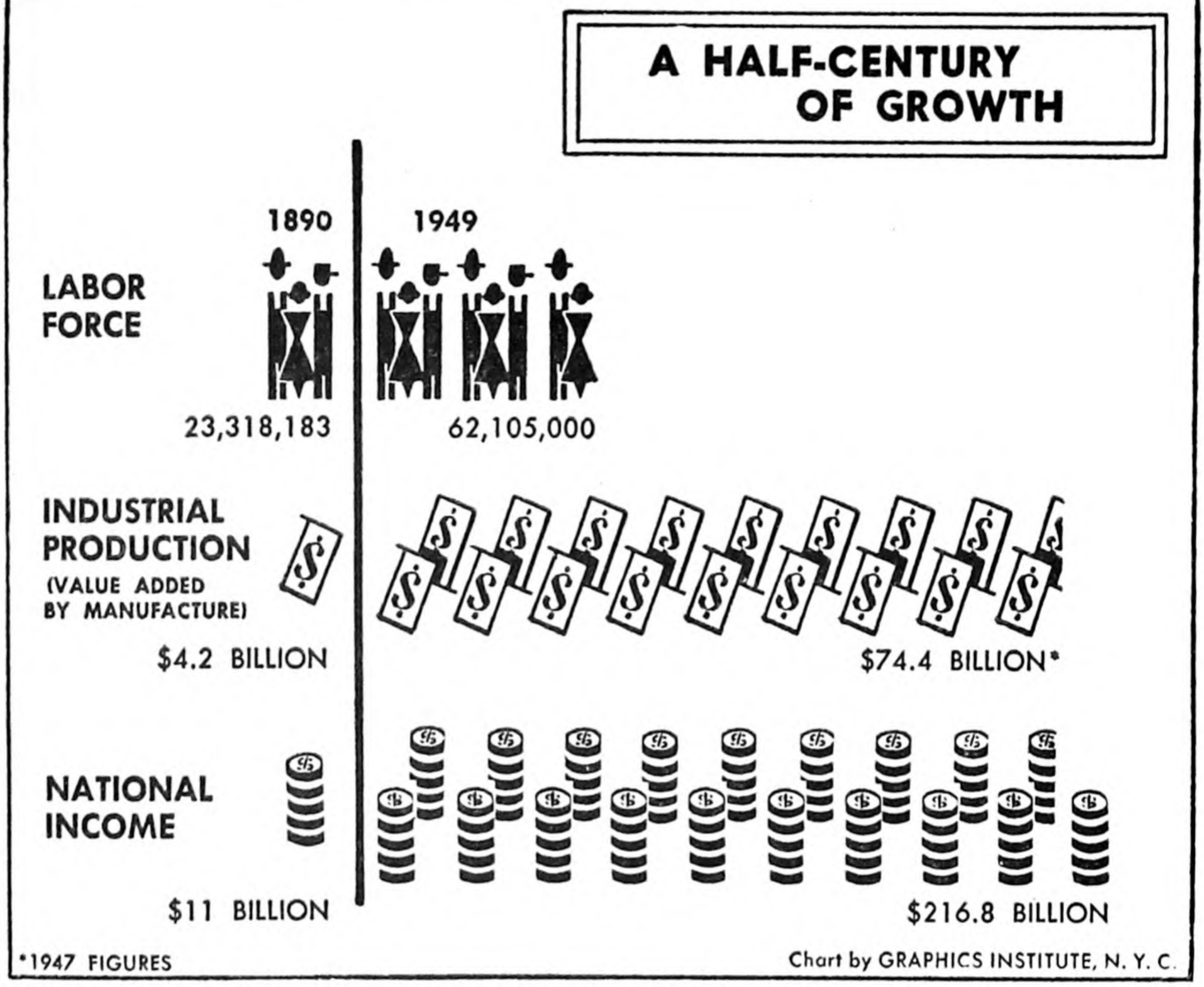
27

Government and Business

Both business itself and the relations of government to business have changed enormously since the United States became a nation. Any study of the relations of government and business today must take into account the changes in the two fields. The changing pattern of business has been frequently mentioned herein, but it needs to be discussed more fully at this point. Business, like almost every other aspect of our culture, has moved in the direction of greater size and greater complexity. Our factories are larger, they produce more goods, and they distribute them more widely than ever before. They are owned and controlled by larger corporations which have more complicated intercorporate relationships than ever before. Huge corporations, as distinguished from small ones and from individual persons, meet an ever increasing percentage of human needs. An ever larger percentage of goods and services is produced wholesale instead of individually and locally for the use of consumers.

Change in such matters, though rapid, has been so gradual that only in recent years has it received widespread thoughtful attention. Before the 1930's, most studies of the subject had been by isolated economists who had no general audience and by government agencies concerned with the operation of anti-trust laws and related measures. Public reaction was divided between characteristic admiration for growing bigness and indignation and concern at the growth of monopoly and the concentration of power in a small number of corporations. The subject first captured the thoughtful imagination of a large number of people during the depression, when Adolf A. Berle, Jr., and Gardiner C. Means brought out a volume entitled *The Modern Corporation and Private Property*. The book showed clearly the extent to which the business of the country was falling into the hands of corporations. It showed corporations expanding rapidly at the expense of other types of business, and it showed a few large corporations growing and prospering at the expense of smaller ones. The authors stated in conclusion that

> The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state — economic power versus political power, each strong in its own field. The state seeks



> in some aspects to regulate the corporation, while the corporation, steadily becoming more powerful, makes every effort to avoid such regulation. Where its own interests are concerned, it even attempts to dominate the state. The future may see the economic organism, now typified by the corporation, not only on an equal plane with the state, but possibly even superseding it as the dominant form of social organization. The law of corporations, accordingly, might well be considered as a potential constitutional law for the new economic state, while business practice is increasingly assuming the practice of economic statesmanship.[1]

President Roosevelt built on this concept of relations between corporations and government when, in 1938, he asked Congress to authorize a broad investigation of our entire economy. He argued that

> The liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself. That, in its essence, is fascism — ownership of government by an individual, by a group, or by any other controlling private power.[2]

In the light of recent developments in the United States he contended that

> Private enterprise is ceasing to be free enterprise and is becoming a cluster of private collectivisms; masking itself as a system of free enterprise after

1. Adolph A. Berle, *The Modern Corporation and Private Property* (New York: Macmillan, 1933), p. 357.
2. *Investigation of Concentration of Economic Power*, Senate Doc. No. 35, 77th Cong., 1st sess., p. 11.

> the American model, it is in fact becoming a concealed cartel system after the European model.[3]

The Temporary National Economic Committee was set up to make the study recommended by the President. Its report, published in 1941 with supporting monographs, vividly portrayed the extent of business concentration. The following are illustrative items: In 1937, 3.8 percent of the central office manufacturing establishments

> employed 51 percent of all wage earners, paid 55 percent of the total wage bill, produced 61 percent of the value of all manufactured products, and accounted for 56 percent of the total value added by manufacture.[4]

In the life insurance business, which controls $28,000,000,000 in assets, there are 308 legal reserve life insurance companies, of which 5 control nearly 55 percent of the total assets of the companies.[5]

In 1937 the 20 largest shareholdings in the 200 largest corporations studied accounted on the average for nearly a third of the voting stock. In 40 percent of these corporations, control was held either in one family or in a small group of families. Fifteen of the 200 great corporations were controlled by three families (the du Ponts, Rockefellers, and Mellons), and their holdings in these corporations were valued at $1,500,000,000.[6]

> On the boards (in 1937) of the 200 largest non-financial corporations, there were 3,544 directorships, and these posts were held by 2,725 individual directors. Nor was the interlocking brought about primarily by inactive directors, for of the 83 directors holding 4 or more directorates, 59 were active in at least one of the corporations they served.[7]

War was raging in Europe when the TNEC report was published. American industry was already adjusting to war production, and a few months later the United States was officially at war. It is not surprising that recommendations for coping with monopolistic abuses were shelved in the face of more pressing matters. Like World War I and the great depression, World War II speeded the process of economic concentration. Large corporations had the plants, the organization and skilled personnel, the research facilities, and the "know how" for production. They had the political capacity and the lobbyist influence needed for getting war orders. It is not surprising that frantic government agencies allotted war orders on the principle that "unto everyone that hath shall be given." A Smaller War Plants Corporation was set up to arrange for the distribution of a certain amount of business to smaller establishments, subcontracting to smaller plants was encouraged, and small-business committees were set up in both houses of Congress. Even so, these correctives had little effect on the dominant trend.

The story of the allotment of war contracts is summarized in a report of the Smaller War Plants Corporation entitled *Economic Concentration and World War II.* From June, 1940, through September, 1944, prime contract awards of some $175 billion were made to 18,539 corporations. Of this

3. *Ibid.*, p. 12.
4. *Ibid.*, p. 90.
5. *Ibid.*, p. 91.
6. *Ibid.*, p. 91.
7. *Ibid.*, p. 92.

amount, two-thirds or $117 billion went to 100 corporations. Thirty percent of the total went to the top ten corporations. Thereafter the breakdown proceeds in similar fashion to the point where it shows an allotment of $13,813,000,000, or nearly eight percent of the total, to one firm, the General Motors Corporation.[8]

The story continues in corresponding detail. On the allotment of research funds the report reads as follows:

> The few big corporations which received during the war years more money from the Federal Government for scientific research and development than the entire nation spent on such research in prewar years can certainly be expected to apply many of the findings of this scientific research to peacetime production. Wartime scientific developments which have no peacetime uses are few and far between.
>
> Big business, in whose laboratories and plants this government-financed research was conducted, will have not only the "first crack" at putting into effect the peacetime applications of most of the wartime industrial research but also the patent rights on the commercial applications of that research.[9]

The Smaller War Plants Corporation having been dissolved and its functions distributed to other agencies of the government, the Senate Committee on Small Business published in 1946 the report here discussed. The House Committee on Small Business published in the same year as a Committee Print a long report of one of its subcommittees in which it discussed much of the same material and likewise viewed with alarm the continuing process of business concentration and made recommendations for curbing it. Early in 1947, the Federal Trade Commission issued a report in which it portrayed the continuing process of corporate amalgamation. In July, 1948, the commission published another report in which it stated that

> No great stretch of the imagination is required to foresee that if nothing is done to check the growth in concentration, either the giant corporations will ultimately take over the country, or the government will be compelled to step in and impose some form of direct regulation in the public interest. In either event, collectivism will have triumphed over free enterprise, and the theory of competition will have been relegated to the limbo of well-intentioned but uneffective ideals. . . . The commission believes that the economic forces, on which it has been basing its warnings, require that a definite choice be made. Either this country is going down the road to collectivism, or it must stand and fight for competition as the protector of all that is embodied in free enterprise.[10]

Early in 1950, at the beginning of hearings of the Joint Committee on the Economic Report on price increases recently instituted by the steel industry, Senator Joseph O'Mahoney stressed the fact that although we were living in a new era created by modern technology we had not yet provided the rule of order by which economic and political freedom for individuals

8. Senate Doc. No. 206, 79th Cong., 2d sess., pp. 29–31.
9. *Ibid.*, p. 57.
10. *Report of the Federal Trade Commission on the Merger Movement; A Summary Report* (1938), pp. 68–9.

could be maintained. We could have free government only if we had a free economy. In our time — speaking in terms of totalitarian and socialistic movements in Europe — people did not lose the power actually to direct their own government until after they had lost the power to direct their own economy. In the United States the drift toward big government did not begin until business had outgrown the jurisdiction of state and local governments so that centralized control was necessitated. The Senator argued that

> The collectivist corporation in our time has become the most significant aspect of our whole economic structure. With hundreds of thousands of employees and hundreds of thousands of stockholders who exercise little or no control over either the policies or the properties of the corporation, these organizations are dominating a steadily increasing segment of the industrial and commercial activities of the whole nation. They affect the lives not only of the people of one city or one state, but of the people of the entire United States. Their managers may and do determine by their private decisions how much of a given commodity 144,000,000 people may have, and the price they must pay for it.[11]

He argued that the failure of people to distinguish between an economy managed locally by owners and an economy of huge industrial empires under the control not of owners but of professional managers was the chief pitfall for democracy.

GOVERNMENT RELATIONS WITH BUSINESS

The Power of Restraint. The transition of our economy from a relatively simple pattern to the complex pattern discussed above has come about gradually, and the policies of government with respect to business have evolved at a corresponding rate. In other words, the relations between government and business today are what they are not as a result of a completely fresh appraisal of our needs. They are in part the product of habit patterns already well established. Although the Constitution was drafted by men who were concerned about the welfare of business and who hoped to aid business through a patent system, a protective tariff, a sound currency, an efficient banking system, and other devices, they were concerned primarily not with promoting business through positive governmental action but with clearing obstructions from the path of business so that it could operate profitably under its own power. They believed in the virtues of competition, for the good of business itself as well as for the good of the people. The powers of business as well as the powers of government were best exercised in a system which provided for the counterbalancing of forces. The primary function of government with respect to business, therefore, was to protect it against undue interference from without and to police it to the extent of seeing that competition prevailed. While in recent years government aid to business has become increasingly important, there is

11. *December 1949 Steel Price Increases*, Hearings, Joint Committee on the Economic Report, 81st Cong., 2d sess., p. 3.

value in approaching the subject chronologically, which means giving attention first of all to regulation and restraint and to such measures as those outlawing monopolies and combinations in restraint of trade, outlawing various unfair trade practices, and providing for the policing of corporate organization and finance. In terms of agencies this means giving particular attention to the work of the anti-trust division of the Department of Justice, the Federal Trade Commission, and the Securities and Exchange Commission.

Anti-Trust Legislation. The regulatory and restrictive action of the federal government extends all the way from anti-trust legislation to price control and rationing of scarce materials and includes attempts to eliminate innumerable kinds of invasion of the rights of competitors and consumers. It includes the protection of small business units against large ones and of private individuals and the general public against business abuses of all kinds. It seeks to preserve order where chaos might otherwise prevail either as a result of the excesses of competition or the lack of necessary planning for cooperation.

Many of our more serious business problems have come from the growth of monopoly or, at any rate, from the growth of corporations so powerful as to disturb the normal balances among competitors. By tradition, the American people have been committed to economic democracy as well as to political democracy. They have believed in competition among individuals as the most desirable method of achieving economic order. The institution of capitalism, which in recent years has been much criticized for its anti-democratic character, was originally thought of as highly democratic in that it provided for the conduct of enterprise by means of aggregations of small amounts of capital from large numbers of people rather than by means of the wealth of a fortunate few. "Monopoly" in economic matters has always been for the American people a term of opprobrium. As known to history, monopoly has usually implied exclusive control over certain fields of enterprise by virtue of a governmental grant of exclusive privilege. The people have opposed the conferring of such privileges, and very little of it has been done in the United States except in public utilities, where duplication of services is extremely costly and wasteful. When in this field a corporation is given the monopoly privilege of providing gas, electricity, telephone service, or transportation service, government seeks to provide a substitute for the regulatory influence of competition by its own regulation of rates and other aspects of the business. In other words, where monopoly rights are given, government attempts to see to it that social obligations are fulfilled.

The last quarter of the nineteenth century witnessed the rapid development of monopoly of a different kind. It derived its power not from any exclusive grant from government but from its ability to drive competitors out of the field. By use of various combinations and agreements among themselves, some of which were called trusts, particular corporations in the

sugar industry, the oil industry, and various other fields sought to drive non-cooperative rivals out of business or force cooperation in maintaining high prices. The evils of monopolistic practices brought angry debate in Congress and resulted, in 1890, in the enactment of the first of the anti-trust laws, commonly known as the Sherman Act. The purpose of the Sherman Act was and is to preserve genuine competition and prevent the growth of privately designed monopoly. Its title proclaimed it an act "to protect trade and commerce against unlawful restraints and monopolies." It made illegal every contract, combination, or conspiracy in restraint of trade or commerce in the interstate and foreign fields as well as actual or attempted monopoly. Criminal penalties were prescribed for offenders, and federal law enforcement officers were authorized to seek injunctions in federal courts to prevent the continuation of illegal trust practices. Private parties, furthermore, were authorized to bring suit for damages up to three times the amount of the damages they had sustained at the hands of violators of the statute.

The Sherman Act was enforced mildly and intermittently during the 1890's, dramatically but sporadically and with political discretion during the administration of Theodore Roosevelt, and systematically but with limited scope during the Taft administration. The idea of the application of such a statute to self-made monopolies was partly new and its implications were not well understood. Furthermore, an attack upon the growth of big business, whatever its evils, angered politically powerful business interests and disturbed admirers of the achievements of American enterprise. As a result Congress, while consistently making some appropriations for enforcement of the statute, never appropriated enough for effective enforcement. The sparsely manned anti-trust division which was established in the Department of Justice was never in position to deal with all complaints against monopolies. The President and his subordinates, like members of Congress, weighed the opposition to effective anti-trust action and willingly limited enforcement action to the more obvious abuses. The Supreme Court, seeking as courts so often do to keep the legislation as closely as possible in harmony with common law rules, sharply limited the meaning of the statute. It held that the statute, which specified "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations," did not actually include every such combination but only those which were in *unreasonable* restraint of trade.[12] By injecting the concept of reasonableness, the Supreme Court made it possible for federal courts thereafter to give immunity to combinations which the judges deemed not unreasonable.

The Clayton Act. Legislation affecting business combinations and business practices was revised and extended in 1914 during the first administration of Woodrow Wilson. One of the measures, the Clayton Act, was enacted

12. *Standard Oil Co.* v. *United States,* 221, U.S. 1 (1911).

partly as a result of pressure from labor, which had been antagonized by a holding of the Supreme Court that the Sherman Act applied not only to business combinations but also to a boycott instituted by labor unions against the products of a non-union manufacturer.[13] Labor demanded exemption from the operation of the Sherman Act and, believing that the Clayton Act secured such exemption, hailed that measure as "the Magna Carta of Labor." Its victory was nullified in part, however, by a subsequent interpretation of the Supreme Court which held that in certain respects labor unions were still subject to the act.[14]

The Clayton Act, at the same time, gave a measure of exemption to agricultural and horticultural organizations. More important, however, it strengthened existing legislation by forbidding undesirable business practices. Among the abuses outlawed were price cutting, the granting of rebates, and the making of false assertions about competitors when those things were done for the purpose of defeating competitors in business. It extended restrictions upon business combinations by forbidding corporations to acquire stock in competing concerns and by outlawing interlocking directorates. It attempted in certain ways to facilitate enforcement of the legislation.

The Federal Trade Commission Act. Congress passed at the same time the Federal Trade Commission Act, which established a five-member independent regulatory commission to make continuing surveys of business practices, to inquire into alleged violations of anti-monopoly legislation, and to issue what were known as "cease and desist orders" against unfair trade practices. The investigative work contemplated for the Federal Trade Commission had already been in progress for a number of years in the hands of a Bureau of Corporations, an agency of the Department of Commerce and Labor. As an agency within an executive department, however, this body was assumed to be subject to undesirable political pressure. Using the Interstate Commerce Commission as to a considerable extent a pattern for the new agency, Congress attempted to protect it from political pressure by specifying the length of terms of members, limiting the power of removal of members from office, and providing that not more than three of the five members should be appointed from the same political party. It was hoped that the Federal Trade Commission would acquire something of the high repute that was now being achieved by the Interstate Commerce Commission.

Since 1914, the Federal Trade Commission has worked along with the anti-trust division of the Department of Justice to combat the evils of monopoly and other unfair methods of competition, and since 1938 has also had jurisdiction over false advertising in certain fields. It makes investigations and publishes reports on business corporations, it investigates alleged unfair trade practices, and issues cease and desist orders to bring them to

13. See the so-called *Danbury Hatters Case*, *Loewe* v. *Lawlor*, 208 U.S. 274 (1908).
14. See *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344 (1921).

an end. If its orders are not obeyed, it seeks to enforce them through a United States circuit court of appeals.

The Federal Trade Commission has met the same difficulties, however, as the Department of Justice. Business interests resisting control have been able to make themselves felt. Business-minded administrations during the 1920's, which prevented effective action by the Department of Justice, also appointed to the Federal Trade Commission men who were opposed to vigorous governmental regulation of business. The federal courts, which in general had become reconciled to the supervision of railroads and related forms of transportation and communication by the Interstate Commerce Commission, seemed to remain permanently suspicious of or hostile to the Federal Trade Commission, which had no specialized field of jurisdiction but which, rather, acted as a policing agency for business generally. Court decisions therefore drastically limited the effectiveness of the commission by narrow interpretations of its powers and refusal to enforce many of its orders.[15]

New Deal Regulation. As we have mentioned earlier, the business depression which began in the autumn of 1929 disclosed a vast network of abuses and shortsighted activities in the business world which dominant sentiment during the middle 1920's had shielded from government control. Under the National Industrial Recovery Act, one of the important emergency measures enacted at the beginning of the Roosevelt administration, the government attempted to bring about business recovery and at the same time eliminate large numbers of these bad business practices. Attempts were made to organize business firms in each industrial field under what were called codes of fair competition. Each code was worked out by representatives of the industry involved and of government. Its purpose was to allocate production among producers in such a way as to prevent the evils of overproduction and cut-throat competition and at the same time to prescribe rules of behavior which would protect labor and consumers. The codes restricted price cutting and discriminatory acts of various kinds, determined maximum hours, minimum wages, and working conditions, recognized labor unions as bargaining agencies, and rectified various other matters.

For the most part, the program of the National Industrial Recovery Act supplanted the administration of the anti-trust laws. Its purpose was to promote cooperation among business firms under restraining codes of fair competition rather than to exercise control by forbidding or breaking up combinations in restraint of trade. The ultimate effects of the new program remained undiscovered because the Supreme Court in May, 1935, held the National Industrial Recovery Act unconstitutional as a forbidden delegation of the rule-making power of Congress to administrative agencies and as, in part, unauthorized by the commerce clause of the Constitution.[16] Had the

15. See Carl McFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission.* 1920–1930 (Cambridge: Harvard University Press, 1933).

16. *Schechter v. United States,* 295 U.S. 495 (1935).

measure not been declared unconstitutional, it seems probable that many of its socially-minded supporters would have turned against it because of growing evidence that business was turning the program too much to its own advantage. Although the codes of fair competition were supposed to be drafted by representatives of all branches of each industry, including small units as well as large ones, it was becoming increasingly clear that big business was exercising dominant control. What was developing, in other words, was not merely a program of business self-government but of the government of business generally by that portion of it that was commonly known as big business. The program greatly facilitated the tendency of dominant business interests to get together to control the whole of business enterprise for their own benefit. It was a matter of relief to many people, therefore, when the recovery statute was held unconstitutional and when enforcement of anti-trust legislation was resumed, not merely as in earlier years but with a vigor never seen before.

Meanwhile the Roosevelt administration sought to stimulate the Federal Trade Commission's investigation of business practices and issuing of orders against unfair trade practices insofar as such a program was needed in conjunction with the broader recovery program. It was frustrated, however, by the presence on the commission of men who had no sympathy with governmental regimentation of business and who had been appointed to the commission for that reason. President Roosevelt directed the removal of one such member in order to replace him by a man more sympathetic with the New Deal program. The Supreme Court, however, a conservative majority of which had consistently restricted the powers of the Federal Trade Commission, now came to its defense against presidential interference by classifying it as an arm of Congress and holding that Congress was within its rights in limiting the President's power to remove commission members.[17] The President, therefore, had to wait until these members' terms expired before he could replace them with men of his own choosing. The fact that he was helpless to bring independent regulatory commissions into line by changing their membership eventually led President Roosevelt to advocate breaking up their functions and distributing many of them among the executive departments.

Current Problems of Anti-Trust Enforcement. The type of institution against which anti-trust laws must usually be enforced is described by the Federal Trade Commission as

> the giant corporation, with its typical divorce between ownership and control, its tight concentration of power in the corporate management, its enormous financial resources, its community of interest with other corporate and financial groups, and its insatiable quest for greater and still greater economic power.[18]

17. *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935).
18. *Report of the Federal Trade Commission on the Merger Movement; A Summary Report* (Washington: Government Printing Office, 1938), p. 22.

Yet important as is mere size and economic power, the anti-trust acts do not specifically outlaw a combination in corporate form merely because it is big, and the Supreme Court has held time after time that bigness is not in itself unlawful. In the face of the obvious influence of mere size of particular great corporations within an industry, the courts must winnow out, or have winnowed out for them, other evidences of restraint of trade before the prohibitions of the anti-trust laws can be applied. Combinations within the steel industry, which is of basic importance to our economy, have been challenged many times. The Joint Committee on the Economic Report recently found that

> The course of prices within the steel industry is largely determined by the judgment of executives of the United States Steel Corporation. Other corporations, instead of raising or lowering their own prices independently, display a marked disinclination to compete pricewise. The small companies live dangerously in the hands of Big Steel.[19]

Discussing the dangerous position of New England businessmen whose welfare depended on the favor of the steel industry, a vice president of the Federal Reserve Bank of Boston told the same committee of a remark that "we live by the grace of God and the Grace of Bethlehem Steel." [20] In spite of the tremendous power already concentrated in a few hands, the process of concentration still goes on. In 1948, by a five to four decision, the Supreme Court refused to declare unlawful the acquisition of the assets of "the largest independent steel fabricator on the West Coast" [21] by a subsidiary of United States Steel. It was Justice Douglas, speaking for the minority of the Court, who brought out the issue of public policy, calling this the most important anti-trust case that had been before the Court in years. As a man trained under Justice Brandeis, who before the beginning of his judicial career wrote a thought-provoking book entitled *The Curse of Bigness*, Justice Douglas was peculiarly sensitive to the problems involved. He argued that

> Size can become a menace — both industrial and social. It can be an industrial menace because it creates gross inequalities against existing or putative competitors. It can be a social menace — because of its control of prices. Control of price in the steel industry is powerful leverage on our economy. For the price of steel determines the price of hundreds of other articles. Our price level determines in large measure whether we have prosperity or depression — an economy of abundance or scarcity. Size is the measure of the power of a handful of men over our economy. That power can be utilized with lightning speed. It can be benign or it can be dangerous. The philosophy of the Sherman Act is that it should not exist. For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power

19. *December 1949 Steel Price Increases*, Senate Report No. 1373, 81st Cong., 2d. sess., p. 4.

20. *December 1949 Steel Price Increases*, Hearings, Joint Commission on the Economic Report, 81st Cong., 2d sess., p. 413. This is a play on the name of Eugene G. Grace, chairman of the Bethlehem Steel Corp.

21. *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 494 (1948).

> should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men.[22]

The Federal Trade Commission has indicated the extent of industrial concentration by showing that in each of thirteen industries more than 60 percent of the assets are controlled by three companies. These begin with aluminum, in which the three companies control 100 percent of the assets, and grade downward through other industries to the thirteenth, meat products, where three companies control 64 percent. In six other industries six companies control more than 60 percent of the assets. Still other industries show similar tendencies toward concentration, but in lesser degrees.[23] Federal agencies cannot interfere with such concentration, however, unless other evidence than mere size can be presented to show restraint of trade.

Anti-trust laws are enforced not only against groups of firms which agree with each other to control prices or otherwise combine against the interests of other competitors and consumers, but also against single corporations which within their own ranks use their power to interfere with competition. For instance, the Great Atlantic and Pacific Tea Company, better known as the A&P, has a reputation of giving excellent grocery service through its nationwide system of stores. It sells many well-known branded products, but it also sells, usually at somewhat lower prices, competing products under its own brand. The Department of Justice accused the A&P of discriminatory practices in violation of the anti-trust laws. In a public address the Assistant Attorney General in charge of the anti-trust division included the following statement:

> A&P's prices to the consumer are not uniform and depend upon its plans for the particular area. In some areas it took planned losses which it recouped through higher prices in other areas. Whenever A&P selected a competitor as its target its policy was to reduce selling prices below cost in that area and to recoup its below-cost losses by raising its selling prices elsewhere. Thus Mrs. Jones in Dallas may have bought at low prices at the expense of Mrs. Brown in Portland, whose prices were raised to cover the Dallas losses. And this did not happen only in isolated stores or just in a few instances. A&P's own records show that planned losses had been taken simultaneously in as many as 30% of A&P's 6,000 stores at the expense of customers in the remaining 4,200 stores. The Court held in the criminal case that these loss operations were a part of a deliberate, planned, year in year out A&P business policy.[24]

In dealing with such abuses by powerful corporations the Department of Justice had long since learned that winning convictions and collecting fines did not get the desired results. It had found that injunctions against the abuses often failed to stop them. What it sought with the A&P, therefore,

22. *Ibid.*, pp. 536–37.
23. *Annual Report of the Federal Trade Commission*, 1949, p. 17.
24. "The Antitrust Laws and the A & P Case," Speech of Herbert A. Bergson, Assistant Attorney General, Before the Twentieth Quarterly Conference of Operation, Incorporated, October 18, 1949, (Department of Justice press release, mimeographed), pp. 9–10.

was to break the corporation into seven independent chains in accordance with existing internal divisions, to divorce manufacturing and processing operations from retail operations, and otherwise to reduce the power of the corporation to subsidize economic warfare in one region by charging higher prices in another. It met with anguished and angry cries from A&P, which extensively advertised all over the country that the department was out to destroy the A&P and that as a result people would have to pay more for their food. The case was still being fought, in the newspapers as well as in the courts, when this book went to press.

The Search for Legality. Since the anti-trust laws as interpreted in the courts forbid only those combinations which "unreasonably" restrain trade, a corporation often has difficulty in estimating whether or not a given line of conduct will be found legal. Businessmen long contended that they were entitled to advance notice as to whether given types of action would result in prosecution. The Department of Justice hesitated to pass upon programs in advance because it is all but impossible to tell merely from a prospectus what a corporation will do with a program in action. During the 1930's, however, the department did offer facilities for presenting business plans for inspection. As of 1950 the program worked as follows:

> This program enables businessmen to submit to the Department specific business plans which they would like to adopt. The Department will review a plan and advise the businessman whether it is one that he can pursue without fear of criminal prosecution under the anti-trust laws. This program is, and under the law must be, limited in scope. It is available only with respect to plans that have definitely crystallized and have not yet been put into operation. A full submission of all the details is required. The action of the Department is necessarily confined to the activities thus disclosed and cannot extend to those not brought to the Department's attention.[25]

In other words, if a corporation presents a plan in good faith and the Department finds it unobjectionable, the department will not thereafter change its mind and start a criminal prosecution. At most it will seek an injunction against continuation of a program which as actually operated seems to violate the anti-trust laws.

ACTION BY THE FEDERAL TRADE COMMISSION

The Basing Point Controversy. The Federal Trade Commission shares with the Department of Justice responsibility for preventing combinations in restraint of trade. One of the most important crusades of the commission in recent years has been that against what is called the basing point system. The term refers to the process followed in many businesses of curbing cutthroat competition by agreements among firms scattered over considerable areas that they will not individually take advantage of convenience of loca-

25. "Enforcement and Administration of the Federal Antitrust Laws," Address of Assistant Attorney General Herbert A. Bergson Before the Southwestern Legal Foundation, March 24, 1950 (Department of Justice press release, mimeographed), p. 16.

tion in selling and delivering goods to particular customers. The device first came to be known as "Pittsburgh plus," because it had to do with the pricing of commodities, particularly steel, in terms of cost when delivered from Pittsburgh. Pittsburgh was thus a "basing point," and steel from Pittsburgh would be sold to a customer at a distance at a given price plus the cost of delivery. By agreement among steel producers, however, steel sold and shipped from another point than Pittsburgh would not only carry the same base price but also the same freight charge, however different the actual shipping cost might be. In other words, on the assumption that there was only one basing point in the industry, Pittsburgh, steel shipped from a point in Alabama to Columbus, Ohio, would be delivered at exactly the same total cost as if it had been delivered from Pittsburgh. Such an arrangement was disadvantageous to consumers and advantageous to producers, in that disastrous competition was eliminated and prices generally were kept high enough to give a profit even to firms which shipped long distances. Railroads in particular benefited by the arrangement, in that purchasers could and frequently did buy commodities from distant points, involving long-distance shipment, at a cost no higher than that which they would incur if they made their purchases from much closer home. The arrangement was used in a number of industries, and was made more complicated by the fact that they maintained not just one basing point but many. Prices in the area closest to a given basing point were determined or influenced by freight rates from the particular basing points. Small competitors violated basing point arrangements at the risk of being driven out of business altogether by their more powerful rivals.

The Federal Trade Commission long had its eye on the obvious and illegal collusion among manufacturers which was involved in the basing point system. Sometime in the late 1930's, the commission prepared to challenge the basing point system maintained by the cement industry. Beginning in 1937, a trial examiner employed by the commission spent three years hearing evidence on the operation of the system, accumulating some 49,000 pages of oral testimony and 50,000 pages of exhibits. On this evidence, the commission issued a cease and desist order against the basing point system. Because of the mass of materials to be appraised, however, the commission did not promulgate the order until 1943. It was at that time challenged by representatives of the cement industry, although preparation for litigation delayed action in the United States circuit court of appeals until 1946, when the court held that the order was based upon insufficient evidence of illegal action. An appeal was taken to the Supreme Court where, in April, 1948 — some eleven years after the trial examiner had begun his work — the Supreme Court reversed the decision of the circuit court of appeals and upheld the cease and desist order of the Federal Trade Commission. The Supreme Court vote was six to one, with only Justice Burton, the one Republican member, dissenting.[26]

The decision was handed down in a time of rising prices, and the cement

26. *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683 (1948).

include information about the securities issued for the purpose of preventing the deception and fraud in the sale of securities which had run rampant before the beginning of the depression and had brought financial disaster to many investors. In 1934, Congress created the Securities and Exchange Commission under the Securities Exchange Act of that year, transferred authorization of registration to this commission, and also gave it broad powers of regulation over securities marketing agencies such as the New York Stock Exchange. The several supervisory powers play a great part in eliminating deception and fraud and in maintaining stability in the investment market. Speculation in securities is by no means eliminated, but it is much more drastically limited than in earlier years.

Congress conferred other broad powers on the Securities and Exchange Commission by the Public Utility Holding Company Act of 1935. A holding company is a company which controls the policies and operations of a number of other companies, usually through ownership of only part of their voting stock. A holding company may perform valuable services for its operating companies by the centralization of purchasing, by the transfer from one company to another of equipment which is necessary but not in permanent use, by the coordination of activities so as to eliminate excess production, and in various other ways. It may, on the other hand, perform highly undesirable functions if it devotes itself primarily to draining the resources of operating companies for the benefit of holding company investors. Under the Public Utility Holding Company Act of 1935, the Securities and Exchange Commission was authorized to survey holding company structures, to approve those which proved to be legitimate, and to require the dissolution or modification of those which were not economically justified. This statute was enacted as a result of disclosures during the depression period that holding company structures had been built up into gigantic and intricate empires, often not for the improvement of business operations at all, but rather for draining the resources and legitimate profits of operating companies into the pockets of speculators. The commission, in the face of great business opposition, has brought about the disbanding of large numbers of holding company organizations, or alternatively has brought about their reorganization for the performance of legitimate functions with at least partial elimination of illegitimate ones. It has become one of the most powerful regulatory agencies in the federal government.

GOVERNMENT AID TO BUSINESS

Although by tradition we expect the dynamics of business to come from within business itself rather than from government, government has from the beginning given a measure of aid and encouragement. Assistance has been given in various forms through patents and copyrights, subsidies in land and money, loans, the privilege of incorporation, police and military protection, tariff protection, encouragement for American business abroad, the maintenance of minimum prices, and so on. Some of these items are important enough to require individual discussion.

Patents. The granting of patents as provided for in the Constitution marks an exception to our tradition of opposition to monopolies. A patent is a grant to the exclusive use of an invention or discovery. The Constitution authorizes such grants to encourage invention by rewarding inventors. A patent under present statutes gives an inventor the right to the exclusive use of his invention for a period of seventeen years. He may use the invention himself, or sell his privilege to someone else, or license others to use his invention under prescribed conditions.

The patent privilege has undoubtedly been the basis of just rewards to deserving inventors, and the prospect of profits may well have encouraged many people to perfect inventions which were used in industry. The patent system presumably has value still. It is also subject to abuse, however, and much of the recent attention to it has been concentrated on the abuses. Although the patent monopoly does not in itself violate the anti-trust laws, patents may be pooled or otherwise used by combinations in restraint of trade in violation of those laws. Frequent attempts are made to patent processes which represent little or nothing in the way of actual invention. Big corporations sometimes pervert the purpose of the patent laws by developing inventions in their laboratories, patenting them so that the same inventions may not be made and used by competitors, and then taking them out of circulation for the patent period. The purpose of such delaying tactics is to prevent new inventions from rendering existing equipment obsolete and boosting costs by making new equipment necessary.

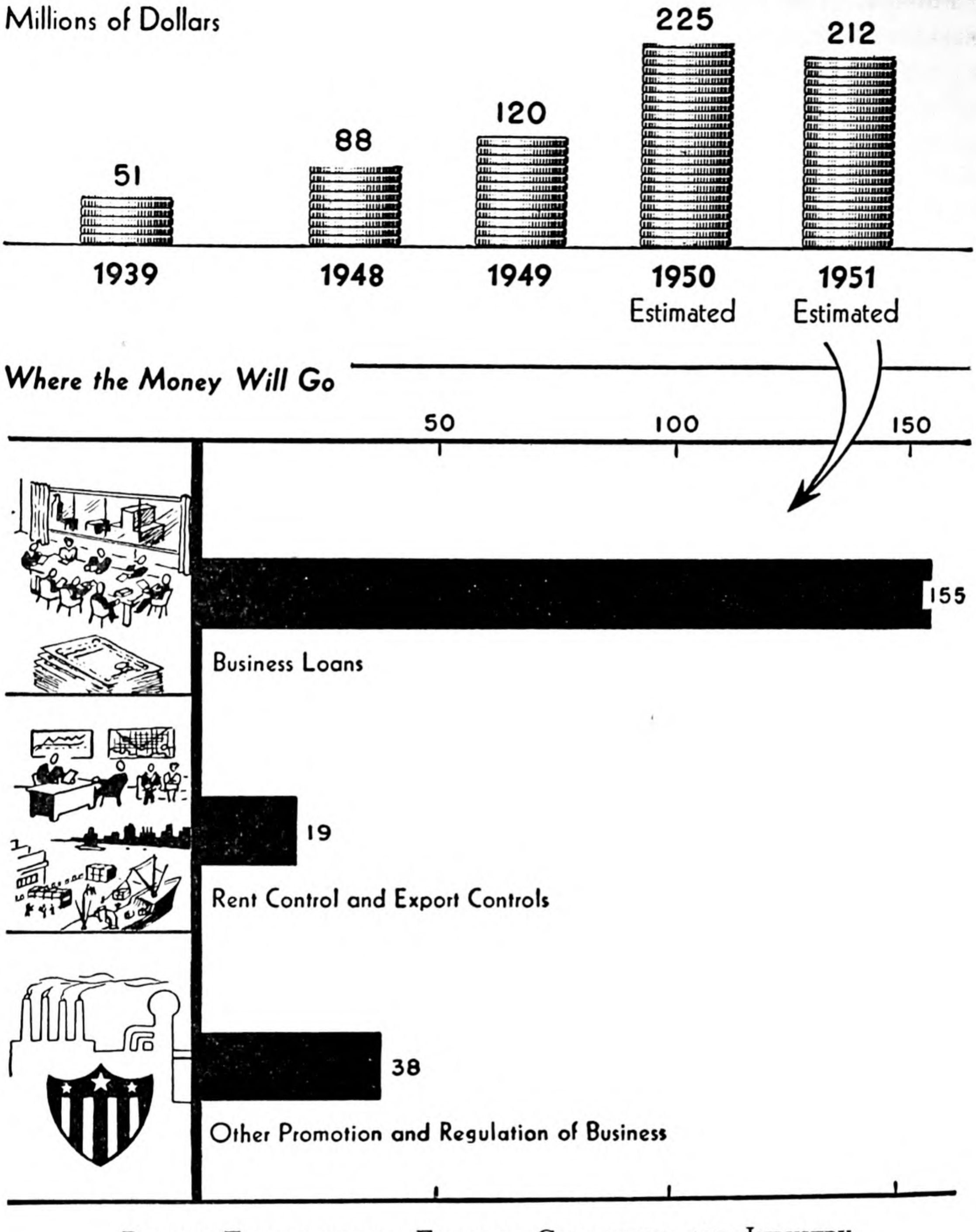
Alleged inventors and patent lawyers try to extend the area of patentability, and the Patent Office, an agency in the Department of Commerce, often seems to abet them in their strategy. Many other people, however, sensing that the granting of patents does not always serve the public interest, advocate limiting the granting of patents, requiring that the owner of a patent make use of it within a given period or license it for use as a condition of keeping his patent right, and various other restrictions. The Supreme Court has in recent years dealt so harshly with all patent claims brought before it as to bring from Justice Jackson the following comment:

> It would not be difficult to cite many instances of patents that have been granted, improperly I think, and without adequate tests of invention by the Patent Office. But I doubt that the remedy for such Patent Office passion for granting patents is an equally strong passion in this Court for striking them down so that the only patent that is valid is one which this Court has not been able to get its hands on.[33]

The patent privilege must still be considered as a governmental aid to business but as one which may easily be abused and may require restraint.

Subsidies and Loans. Government aid to business through subsidies and loans has been discussed in other chapters. The federal government began to subsidize business on a large scale in the post-Civil War period when it gave huge tracts of land to the builders of the Pacific railroads. It also made big loans to the same companies. Present day subsidies to shipping

33. *Jungerson* v. *Ostby and Barton Co.*, 335 U.S. 560, 572 (1949).



lines and airlines are but a part of the original pattern. Part of it also is the loans to business made by the Reconstruction Finance Corporation. Those loans for the fiscal year 1949 amounted to more than $1,250,000,000,[34] with a little more than $3,000,000 allocated to local governments. The business aid went to industrial and commercial enterprises, railroads, financial

34. Reconstruction Finance Corporation, *Annual Report and Financial Statements,* 1949, p. 16.

institutions, mortgage guarantees and insurance, and catastrophe loans. The RFC stated that

> The heaviest demands made upon the Corporation came from small established businesses and new small business enterprises, a class of borrowers whose legitimate credit demands, even in so-called normal times, are fulfilled with difficulty by usual sources of credit.[35]

As this statement indicates, federal lending is used to direct the course of business, in this instance to protect small business against the pressure of expanding bigness. Particular loans made to needy big businesses in competition with other big businesses better fixed financially have aroused angry protest from the latter. In spite of the dissension, government lending has a boosting effect on those businesses which directly benefit from it.

Minimum Prices. Although fixing minimum prices for the benefit of the seller is more general in agriculture, which will be discussed in the following chapter, than in business generally except for public utilities, it has its place and perhaps also a prospect of future growth in the business world. One of the major purposes of the National Industrial Recovery Act of 1933 was to provide for codes of fair competition which would prevent the economic waste of cut-throat competition. It was believed that prices which were too low endangered not only the individual seller but also competing sellers who had likewise to reduce prices to unprofitable levels in order to sell in the same market. The National Industrial Recovery Act was found unconstitutional, but a later statute regulating prices in the coal industry was upheld.[36] Although the coal act expired and was not renewed, the precedent has not been forgotten, and pressure is developing to restore price protection and extend it to still other fields. To a limited extent, furthermore, Congress, through the Miller-Tydings Act, authorizes sellers to enforce the maintenance of minimum prices on trade-marked goods, including copyrighted books, when the articles are resold by retailers. Such retail price maintenance may be bad for the buying public, but it gives a comforting protection to manufacturers, just as supporting agricultural prices aids farmers.

The Department of Commerce. Although many agencies of the federal government give aid to business in one form or another, the Department of Commerce is the official agency for that purpose. The department was established in 1903 as the Department of Commerce and Labor, to protect the interests of both business and labor groups. The labor responsibilities were transferred from it to a new department in 1913. During the 1920's the department was built up to vast proportions under the leadership of Herbert Hoover as Secretary of Commerce and later as President. Its function was to encourage business in every possible way and to collect and

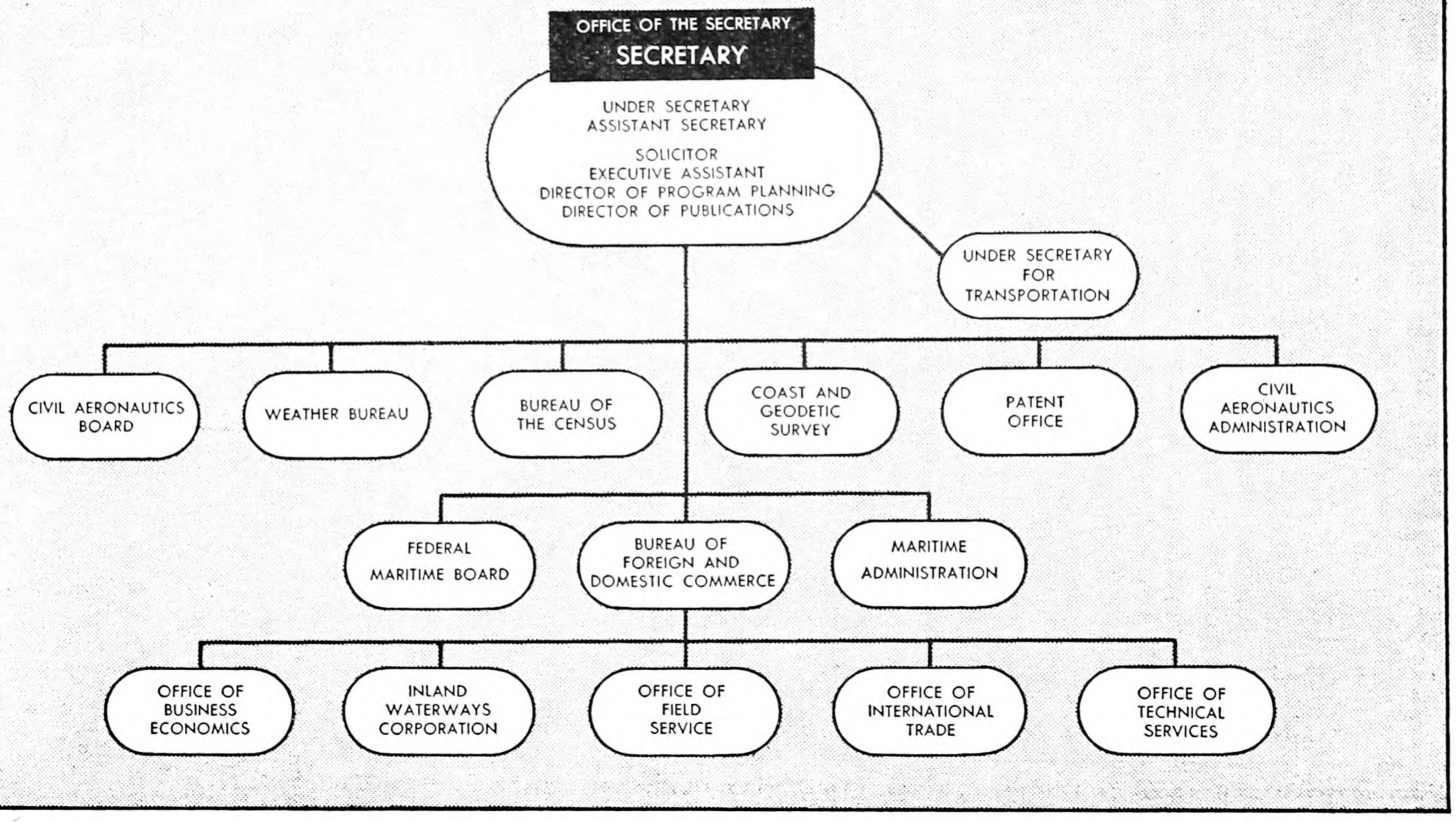
35. *Ibid.*, p. 8.
36. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940). See Ralph H. Baker, *The National Bituminous Coal Commission* (Baltimore: The Johns Hopkins Press, 1941).

disseminate information of use to business in producing and marketing American products. It symbolized the then dominant belief in the ability of American business to achieve permanent and ever-expanding prosperity if properly encouraged and aided by government and if left free from excessively hampering government restraints. The depression of the 1930's exploded this belief and to some extent discredited the Department of Commerce. For a considerable period it was permitted to operate with minimum appropriations and minimum personnel while other agencies were created or expanded to promote business recovery. Only in recent years has it gradually regained some of its lost prestige.

The functions of the department are indicated in part by the titles of its several agencies. Among them is the Patent Office, which was discussed above. The National Bureau of Standards engages in a wide range of scientific investigations in physics, mathematics, chemistry, and engineering. It seeks to standardize units of weight and measurement throughout wide ranges of materials. It engages in extensive research and development work for the Department of Defense and for the Atomic Energy Commission. Because of the importance of the federal government as a purchaser of articles privately manufactured, the influence of the bureau extends widely over industrial production. The Bureau of the Census, another of the older agencies, gives incidental aid to business by accumulating a vast amount of information not only about population but also about business activities of almost every kind. The Bureau of Foreign and Domestic Commerce, a newer and in general a more aggressive agency, accumulates enormous amounts of current information about all sorts of business activities at home and abroad and makes such information available to businessmen both through publications and through replies to inquiries. The foreign services of this bureau for a time rivaled the Foreign Service of the State Department, but competition and conflict between the rival services brought a consolidation of most of them in the State Department.

The Department of Commerce is expected to be a "political" agency. That is, it is expected to be responsive to the will of the President and his subordinates as influenced by public sentiment. Partly for this reason, the work of the Interstate Commerce Commission, which is expected to exercise independent and unbiased judgment, was not transferred to the department when the latter was created. The responsibilities allocated to the Federal Trade Commission were likewise regarded as of a sort not to be given to one of the executive departments. Yet as the control of business expands, and particularly the control of transportation, it is recognized, as indicated in the preceding chapter, that the exercise of many regulatory functions needs to be coordinated with the general program of the administration in power. It was with this fact in mind that the President's Committee on Administrative Management in 1937 advocated breaking up the functions allocated to the independent regulatory commissions and distributing to the relevant departments those which were not primarily judicial in character. Although this sweeping change was resisted, a number of

DEPARTMENT OF COMMERCE



moves have been made in that direction. The Civil Aeronautics Administration is located in the Department of Commerce, and the Civil Aeronautics Board is housed with it; and there is some overlapping of personnel and administration even though the board is nominally an independent regulatory commission. President Truman's plan to break up the functions of the Maritime Commission and allocate them to agencies corresponding to those having to do with areonautics control, as discussed in the preceding chapter, and his request for the appointment of an Under-Secretary of Commerce for Transportation, were part of a program for centralizing control of commerce in the Department of Commerce. The President's rejected reorganization order of May 9, 1950, transferring the Reconstruction Finance Corporation to the Department of Commerce was part of the same movement. The extent of this centralization is one of the issues of the day.

BUSINESS INFLUENCE UPON GOVERNMENT

Although we are here concerned primarily with the impact of government upon business, the reverse impact is also important. Since we operate as a democracy and since ours is primarily a business culture, it is inevitable that our government should have a kind of business coloration. It is only reasonable and proper that government should seek to promote the interests of business, should protect it from depredation from without, and should engage in a measure of policing to preserve order within the area of business competition. The problem of business-government relations becomes more important and more critical, however, as business organizes itself in ever larger and more powerful units which can wield concentrated power in competition with government. In the already quoted words of Justice Douglas, "all power tends to develop into a government in itself."[37] The giant corporations of the steel, automobile, and aluminum industries, to take three examples, must be viewed more as government in themselves than as the "persons" which our legal theory hold them to be. It is a significant fact that whereas in 1949 the President of the United States received a salary of $100,000, the president of General Motors Corporation received from his employer more than $586,000.[38] As concentrations of power which are not democracies but oligarchies, giant corporations can wield enormous influence over the welfare of the country and over the policies of official government, far more influence than could be exerted by the unconcentrated influence of the people directly connected with them. They go a long way to determine tax and spending policies, the nature and scope of government regulation, policies on foreign trade, and so on. They not only act as effective lobbyists; they also determine so effectively the course of economic activity within their own fields that government must deal with economic situations of their creation and not of its own planning. Government can regulate them, compete with them, and subsidize them; but

37. *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 536 (1948).
38. *New York Times*, April 23, 1950.

as long as the major dynamics of our economic order come from great corporations, those corporations may be expected in large part to call the tune to which government must dance.

With this much said, however, a reservation must be noted. To influence the course of official government, business, though not primarily democratic in its own organization, must take account of democratic processes. It must be prepared to "sell itself" to the people. American business has been far more effective at wielding power and chalking up economic achievements than at persuading the people of the merits of its leadership. The case for business leadership — the case for political conservatism generally in the United States — is probably a better one than our business leaders have been able to portray. Accustomed to the exercise of power rather than of diplomacy and education and persuasion, they are inept in public relations. By contrast with economists and others who see matters differently, they handle themselves badly when appearing before congressional committees and in other situations which call for intelligent explanation and salesmanship, and thus they do not well serve the cause of business or the welfare of the country.

References

Thurman W. Arnold, *The Bottlenecks of Business* (Reynal & Hitchcock, 1946).

———, *Democracy and Free Enterprise* (University of Oklahoma Press, 1942).

Adolph A. Berle, Jr., and Gardiner C. Means, *The Modern Corporation and Private Property* (Macmillan, 1933).

Donald C. Blaisdell, *Economic Power and Political Pressures* (Government Printing Office, 1941).

John M. Clark, *Social Control of Business* (McGraw-Hill, 2d. ed., 1939).

Marshall E. Dimock, *Business and Government* (Holt, 1949).

Peter F. Drucker, *Concept of the Corporation* (John Day, 1946).

Corwin D. Edwards, *Maintaining Competition Requisites of a Governmental Policy* (McGraw-Hill, 1949).

Merle Fainsod and Lincoln Gordon, *Government and the American Economy* (Norton, rev. ed., 1948).

George B. Galloway, *Government Planning Under Codes* (Harpers, 1935).

Robert A. Gordon, *Business Leadership in the Large Corporations* (Brookings, 1945).

Ford P. Hall, *Government and Business* (McGraw-Hill, 3d ed., 1949).

Alvin H. Hansen, *Economic Policy and Full Employment* (McGraw-Hill, 1947).

Harold D. Koontz, *Government Control of Business* (Houghton Mifflin, 1941).

David Lynch, *The Concentration of Economic Power* (Columbia University Press, 1946).

Carl McFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission, 1920–1930* (Harvard University Press, 1933).

Fritz Machlup, *The Basing Point System* (Blakiston, 1949).

Vernon A. Mund, *Government and Business* (Harpers, 1950).

United States National Resources Committee, *The Structure of the American Economy* (Government Printing Office, 2 vols., 1939–1940).

28

Government and Agriculture

By tradition, agriculture as well as business in this country has been regarded as an area for private enterprise rather than for government operation or control. Farming, moreover, has been not only a means of production but also a unique way of life, and as such has been regarded as peculiarly exempt from government interference. Yet in agriculture as in business, the passing years have brought fundamental changes. The scale and methods of production and marketing have greatly changed. Although the individual farmer and farm home still survive, agriculture has yielded more and more to mechanization and mass production. Problems of credit to facilitate production and marketing have become as important in agriculture as in business generally. Production must be adjusted to world needs and prices maintained at stable levels if farmers are to avert economic disaster. Further, the thesis that our agricultural resources are inexhaustible has been exploded, and both individual and community action to preserve the soil are recognized as essential if the United States is not eventually to become a hungry nation in the midst of a hungry world. The responsibility during and after the close of World War II for feeding disaster-ridden European countries speeded agricultural production in the United States, and consequently the rate of soil depletion, and added to the uncertainties involved in planning agricultural operations.

Any activity which involves ultimate questions of national survival and immediate questions of the well-being of millions of people whose economic status in turn affects that of the rest of the population requires the serious attention of government. In agriculture as in business, early forms of governmental regulation were predominantly by state and local governments, and the federal government became involved only as the expanding scope of agricultural problems necessitated federal action. It is the purpose of this chapter first to outline briefly the history of the expansion of federal activity in agriculture and then to analyze the efforts of the federal government to bring about improvement in methods of production, to extend credit in order to facilitate marketing, to adjust production to consumption needs, to conserve the soil and plant heritage, to make possible continued production far into the future, and to maintain some uniformity of welfare

among farm residents and farm owners on the one hand and, on the other hand, among the increasing proportion of the American people who are not employed in agriculture and who live in cities and towns.

HISTORICAL BACKGROUND

Before the Civil War. During the early part of our country's history, the federal government itself owned vast tracts of forested and uncultivated land. The primary relation of the government to agriculture was through distributing this land to private owners. Before 1820, the land was sold at a minimum price of $2 an acre, and the minimum amount for a single purchase was 640 acres. Since few prospective settlers then needed tracts of this size, or had the money to buy them, much of the land was sold to speculators who resold it in smaller tracts but at higher rates per acre. The buying and selling of land, indeed, provided at the time the principal subject of speculation in the United States.

The Public Land Act of 1820 brought a change of policy, permitting the sale of tracts as small as eighty acres at a minimum price of $1.25 an acre, thereby encouraging settlers to buy directly from the federal government. Taking advantage of the inadequate policing, however, large numbers of pioneers established themselves on public land without even taking the trouble to get titles. To legitimatize these holdings Congress in 1841 enacted a measure permitting occupants to pay for their farms at minimum prices and receive clear titles. A movement continued for even greater liberality. In 1860, President Buchanan vetoed a homestead bill which provided for the sale of homesteads of 160 acres to persons residing on them for five years, for the nominal sum of twenty-five cents an acre. The presidential objections involved the issues of the coming Civil War. The land would have been virtually given to private individuals, and the bill, furthermore, provided for the outright donation to the states of public lands within their borders which were not sold within a given period. Devotees of state rights and defenders of the South took the position that the federal government had no constitutional power to make donations of any kind to the states, presumably fearing that such donations would be used to subvert state policies. Buchanan also vetoed a bill to give public lands or their proceeds to states for the establishment of agricultural colleges, in spite of the fact that our public land policy had called for setting aside sections at regular intervals for the establishment of local schools.

From the Civil War to World War I. The coming of the Civil War broke the grip of southern influence and permitted the expansion of federal power in agriculture. During 1862, three important measures were enacted. The first provided for the establishment of a Department of Agriculture which was to diffuse agricultural information and "procure, propagate, and distribute among the people new and valuable seeds and plants." The new agency operated for a number of years under the direction of a commis-

sioner but became a full fledged executive department in 1889 under the supervision of a secretary who was a member of the President's Cabinet. The second important measure was a Homestead Act, which encouraged settlement by giving 160 acre homesteads to settlers who occupied the land for a minimum of five years. The third measure, the Morrill Act, granted large quantities of public land for the establishment of colleges in the several states, thereby providing the basis for a number of our present state universities. In 1877 it was supplemented by a measure which provided for the establishment of agricultural experiment stations in the several states. On the basis of most of these measures, the federal government made continuing appropriations to promote agricultural welfare. To facilitate the marketing of agricultural products, it encouraged the formation of farm cooperatives and exempted them from the operation of antitrust laws. When the Federal Reserve Act of 1913 failed to provide adequate credit facilities for agricultural purposes, Congress in 1916 enacted a Federal Farm Loan Act as the first of a series of measures calculated to give such aid. The federal government turned a cold shoulder to agriculture over the protective tariff, a device predominantly for the benefit of business, which had the effect of making farmers pay more for manufactured goods than they would have had to pay in a free market. Even there the Democratic administration of Woodrow Wilson brought about a measure of relief. It was not until the ensuing decade that the protective tariff kept out agricultural as well as manufactured imports.

World War I and Its Agricultural Aftermath. The most important immediate effect of World War I upon agriculture was the creation of a temporarily inexhaustible market for farm products. Crop production was greatly expanded, mechanization of farming was speeded up, prices of products rose to unprecedented levels, and prices of farm land rose accordingly. With the resumption of normal agricultural production in Europe and with the coming of the depression of 1921, American farmers found themselves overloaded with debt and unable to market their products at reasonable prices and at times at any price at all. Throughout vast areas they had made the mistake during the war of cultivating arid land on which the top soil ought never to have been broken, with the result that, during the dry years ahead, much of the soil literally blew away. During the 1920's suffering farmers clamored loudly for federal aid of various kinds, principally in the form of more credit and of marketing facilities for excess produce. Congress considered but did not enact measures for dumping excess products on foreign shores at whatever prices they might bring, so that cut-throat competition in the local markets would not wreck the price structure at home. Congress attempted to protect the growers of livestock by legislation to regulate the meat packing industry. It enacted a measure to eliminate some of the worst features of speculation involved in buying and selling grain. It enacted additional agricultural marketing and credit legislation. It further encouraged cooperative effort among farmers. In 1929, at the

request of President Hoover, it established a Federal Farm Board which was authorized to buy up government surpluses in order to keep them from clogging markets and depressing prices. These several measures, enacted under pressure from farm organizations newly grown to national political power, coupled with the continuation of other activities largely under the direction of the Department of Agriculture, represented a movement in the right direction, but they proved altogether inadequate when agriculture along with industry ran into the world-wide depression which began in 1929.

Agriculture and the New Deal. The depression greatly restricted both the domestic and the foreign market for farm products. Hundreds of thousands of farmers who had known lean years through the 1920's now faced outright financial disaster. There may have been no more food than consumers needed, but there was much more than they were able to buy. Crops often proved not worth harvesting, and if harvested were not worth the expense of delivery to nominal markets. Without the income needed to pay their debts, farmers were faced with widespread foreclosures on mortgages. In some parts of the West, the disastrous experience of having farms sold to pay mortgages became so general that farmers rose in a body and by threat of violence prevented continuation of sales.

Although it was obvious that one of the basic evils was poor distribution of badly needed food, the leaders of the Roosevelt administration which came into power in 1933 thought that the immediate problems of the farmer could be solved only by lifting the prices of farm products. The primary purpose of the Agricultural Adjustment Act of 1933 was to curtail production of major farm crops to such a point that demand would raise the price and give the farmers a reasonable income. It was no easy task to get farmers to work together to curtail production. There was always the prospect that, even if a large percentage of farmers could be persuaded to conform, a minority would take advantage of the program to enlarge their own production and thereby profit by the self-restraint of others. It was recognized, furthermore, that farmers would not take kindly to direct governmental restriction of production. The statute therefore attempted to secure farmer cooperation by an indirect method. Agents of the Agricultural Adjustment Administration would estimate the country's needs in corn, wheat, cotton, and other products. They would estimate the acreage needed for these amounts. Acreage would be allocated to communities and farms where these crops had previously been grown. Each farmer who reduced his acreage would receive from the federal government substantial payments for his cooperation. A farmer was not coerced into limiting his production to the quota assigned to him, but if he refused to limit his production he received no payments and these were large enough to make it profitable to conform.

It was assumed that the general taxpayer, who was already complaining about the burden of taxes, should not be further burdened by taxes to pay

farmers for taking land out of production. An arrangement was made, therefore, to recoup government costs within the process of handling agricultural commodities. A tax was levied at selected stages on the processing of grain, cotton, and other commodities, to provide a fund for benefit checks to farmers. The money raised by the processing tax was earmarked for this specific purpose.

These provisions of the Agricultural Adjustment Act continued through 1935, did a great deal to reduce acreage in specified crops and may well have had considerable responsibility for the substantial rise in farm prices. To this measure, however, as to most other New Deal measures, some people were intensely opposed. The processing tax was challenged in the federal courts, and the Supreme Court by a divided vote and with a majority opinion which is extremely difficult to analyze, held the statute unconstitutional. It declared that the processing tax was not "an exaction for the support of the government" as a legitimate tax had to be, but was merely a technique for transferring funds from one group of private individuals to another. Its purpose was the regulation of agriculture which, the majority contended, was subject to regulation only by the states.[1]

The decision defeated agricultural production-control by means of the processing tax device. Although there is reason for believing that the Supreme Court as now constituted would uphold such a measure, it has not been reenacted. Instead, during the time when crop limitation was important, Congress turned to a device which was similar yet different enough so that its constitutionality could not be judicially tested. This measure, known as the Soil Conservation Act of 1935, provided for no taxation and set up no special fund, but it authorized paying farmers out of the general funds in the United States Treasury to take land out of agricultural production in order to conserve the soil. By a jurisdictional technicality, no person can bring suit to test the constitutionality of expenditures made out of the general funds of the treasury, as distinguished from funds collected from particular sources and earmarked for particular purposes. The expenditure may be unconstitutional but unconstitutionality cannot be demonstrated, and expenditure can therefore not be blocked by judicial action. The restriction of production under the Soil Conservation Act was much less extensive than that previously practiced under the Agricultural Adjustment Act, but even so the effect was substantial.

The New Deal program for agriculture went far beyond the restriction of production. The several credit agencies for agriculture were consolidated in the Farm Credit Administration, and its facilities were greatly expanded. Loans were made on land and on crops to enable farmers to recover economic stability. Bankruptcy legislation, by means of which creditors may eventually take over the property of debtors in default, was modified to postpone foreclosure in the hope that returning prosperity might make it unnecessary. The gold content of the dollar was reduced by approximately forty percent in the hope of so changing the relation of United States cur-

1. *United States* v. *Butler,* 297 U.S. 1 (1936).

rency to that of foreign countries as to stimulate the exportation of American farm products.

The government also undertook a gigantic and varied program of agricultural conservation, ranging all the way from soil conservation to general improvement in ways of rural living. The Department of Agriculture, the Department of the Interior, and other federal agencies attempted by projects, discussions, and articles to teach farmers how to prevent erosion, reduce depletion of the soil through cultivation, and in various other ways conserve the soil heritage. The government bought up huge tracts of cut-over and worn out land and took steps to return it to forests or otherwise give it protection. By this means and by the erection of dams, water was conserved for use when needed and some of the disasters of floods were prevented. In certain areas trees were planted over long distances in attempts to break the force of the wind and keep soil from being swept away. Large numbers of farm families lived on land so poor that under no circumstances could it provide an adequate living. The government bought up much of this land and helped its former inhabitants establish themselves where the prospect of earning a livelihood was more promising.

While the project carried on under the direction of the Tennessee Valley Authority was perhaps predominantly industrial, its agricultural significance was great. The government-constructed dams and government-operated power plants made electricity available at low cost to illuminate farm homes and to operate farm machinery. Farming as a way of life and the techniques of farming were transformed by these new resources. Farm income increased, transportation facilities were improved, the level of education rose, and the life of whole communities was lifted generally. Under jurisdiction of the Tennessee Valley Authority, furthermore, the government undertook reforestation projects, modified the character of land use, and in other ways experimented in better use of agricultural resources. The TVA project operated almost as a gigantic agricultural experiment station. Its influence spread in various ways to communities outside the Tennessee Valley itself, and its success provided much of the continuing though as yet frustrated demand from people in other localities for similar projects.

World War II. The New Deal lifted American agriculture from the depths of the depression to a level of prosperity which it had not enjoyed since World War I. World War II brought a continuation of prosperity under drastically changed circumstances, creating an unprecedented demand for almost every agricultural product. The United States had not only to feed its own civilian and military population but also to maintain a flow of food across the submarine-infested ocean to our allies in Europe. American farmers were called upon greatly to expand production under difficult circumstances. The demands of military service and of industrial production for war purposes drained away much of the farm labor supply. Production of farm machinery was greatly curtailed to speed military production. The prices of things the farmers had to buy crept upward in spite of govern-

ment efforts to keep prices stabilized. Rising expenses on the farm necessitated an increase in farm income, while at the same time consumer prices of farm products had to be stabilized. Government attempted to solve the price problem by rationing the purchase of most farm products, fixing prices to consumers, and paying production subsidies to farmers over and above the amounts received for their products. These subsidies were deemed necessary to enable and encourage farmers to continue adequate production. It was thought expedient for government to subsidize farmers rather than to let retail prices rise. Had prices to consumers been permitted to rise high enough to yield an adequate income to farmers, it was assumed that middlemen, according to customary behavior, would have increased their levy upon products. Furthermore a substantial rise in food prices would have disrupted the wage-price structure generally, thereby necessitating wage rises which would in turn have necessitated changes in the prices of still other commodities.

Lines of control over agricultural production and distribution were hard to maintain. Various issues such as the subsidizing of farmers, the amounts of the subsidies, control of prices to consumers, techniques and methods of rationing, and related subjects were continually discussed in Congress. Rationing and price control were administered largely through the Office of Price Administration. To secure adequate centralization of control over various food problems, the President eventually found it necessary to establish a War Food Administration in the Department of Agriculture under the leadership of an administrator who reported directly to the President.

In speeding the production and distribution of food, wartime machinery probably did all that could be expected of it. The armed services were well fed; the civilian population, with higher money incomes among the working population than ever before and with fewer commodities to spend it on, consumed more and better food than ever before; and large quantities of food were shipped to our allies. From a long range point of view, however, the appraisal is a less happy one. Farms, farm homes, and farm machinery became increasingly run down, while at the same time prices of farm land climbed skyward as during World War I and thousands of acres of eroding or poorly watered land were cultivated for such crops as they would yield, breaking the soil coverage and once more exposing the land to the ravages of wind and water. Again the agricultural economy had been drastically disturbed, and the wastage at the agricultural base threatened eventual widespread impoverishment, possibly including another mid-western dust bowl. Farmers emerged from the war period with agricultural prices rising and the demand still high, and with a rising price level in related fields which necessitated maintaining their own income. The prospect was, and is, one to increase forebodings for the national agricultural welfare.

CURRENT PROBLEMS OF AGRICULTURAL CONTROL

In exercising control over agriculture, government sets for itself a number of goals each of which limits some of the others. It is important that produc-

tion be encouraged to assure an adequate food supply for the American people, and such additional supply as, in harmony with our national policy at the time, is needed in other countries. It is important not merely for farmers themselves but for the nation as a whole that the farm population be relatively prosperous so that interchange among farmers, workers, and manufacturers may continue its normal pace. It is also important, however, that the natural heritage in soil and crops be protected against the drain of unneeded production, the waste of improper farm methods, and the ravages of floods and winds. In planning new farm legislation, a Senate subcommittee in 1948 listed twenty-one objectives of a well-rounded legislative program for agriculture, ranging all the way from adequate quantity and quality of production to social security benefits for farm workers.[2] Obviously the task of promoting the agricultural welfare of the country, once undertaken by government, proves enormously complicated. Agricultural welfare is in essence the public welfare.

Parity Prices. The price support programs for agriculture carried out during the New Deal period were based on the assumption that the public welfare required that farm income be on a parity with the income of other sections of the population. Farmers believed that during the 1920's they had been denied their normal equality of position. Their spokesmen pointed to the period between 1909 and 1914 as in many respects typical of a proper balance among the several income areas. The government therefore attempted to adjust prices so as to reestablish a parity of economic relationships comparable to that prevailing during the base period from 1909 to 1914. The Agricultural Adjustment Act of 1933, for example, declared it the purpose of Congress to

> reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of agricultural commodities in the base period.

This conception of a price level or price position to which farmers were entitled was reflected virtually unchanged in acts of Congress dealing with agriculture during the ensuing fifteen years.

Although the proportion of the population engaged in agriculture has been declining steadily since the colonial period, groups of farmers have since the 1920's been so well organized in pressure groups, and the so-called farm bloc has operated with such effectiveness, that agricultural interests are assured of favorable attention from the federal government. Urban consumers of farm products, however, remain critical of legislation which requires them to pay higher prices for food. When the government subsidies and price restrictions of World War II were abandoned, consumer prices rose to take the place of the subsidies and continued to rise thereafter for a considerable period as farm prices continued to climb. Much of the high cost of living for low income groups were represented by food costs.

2. *Long-Range Agricultural Policy and Program,* Senate Report No. 885, 80th Cong., 2d. sess., pp. 45–6.

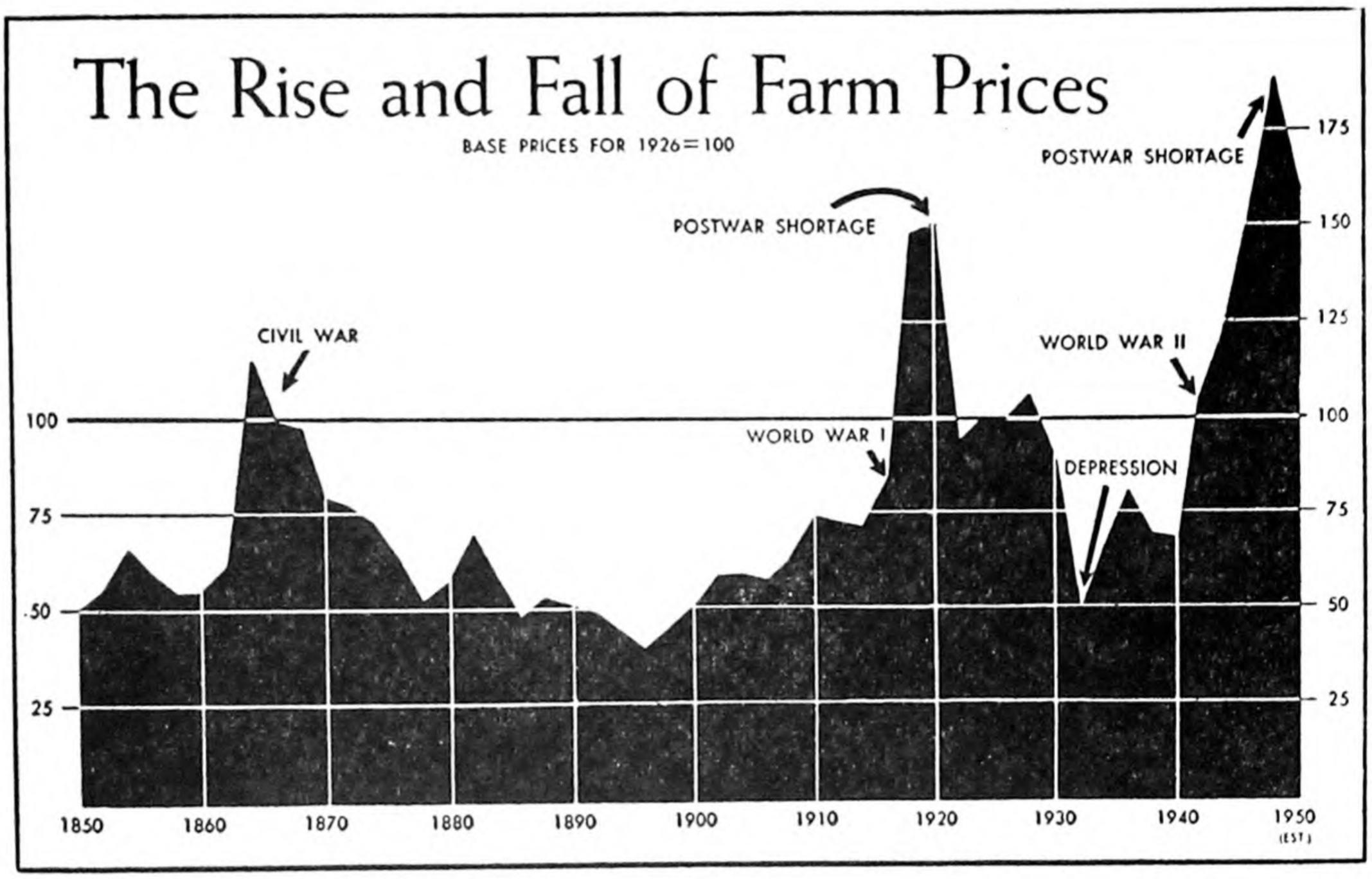
When among the many farm articles that continued to rise in price, or stayed at high price levels, a particular item began to decline, consumers resented the policy of government in buying up excess quantities of that item to support its price. As early as 1948, when the situation was far less bad than it was to become, it was regarded as scandalous that, to maintain the price of potatoes of which there was an excess, farmers in the Pacific northwest should be able to sell potatoes to the government for $2.60 a hundred pounds and buy them back at thirty cents or less to feed to livestock.[3]

Methods of Supporting Prices. The government supports agricultural prices primarily by taking excess produce off the market so that price is kept up by demand. This is done by outright purchase of perishable commodities and by somewhat less direct purchase of stable commodities. As to the latter, the government makes loans to farmers on their crops at the level of price support, and merely takes the crops off the farmers' hands at the price support figure if market prices fall below that figure. On most commodities the support price has in recent years been fixed at about 90 percent of the parity figure for each commodity as worked out by price experts in the Department of Agriculture. Support prices as provided for in the Agricultural Act of 1949 began at 90 percent of parity and ranged downward in some instances to 60 percent, depending on the size of the crop. In other words, the support price on crops of normal size was to be at the 90 percent level, while if crop totals increased, the support level was to be reduced by specified percentage steps. The purpose of the sliding scale was to discourage increased production which might otherwise be invited by the promise of price support at a fixed level of 90 percent of parity.

Maintaining prices by purchasing surpluses worked well as long as there was little tendency for prices to sag. It created serious problems, however, when in 1949 agricultural prices began a general decline. The Commodity Credit Corporation had at that time authorization to use $4,750,000,000 for price support. As of January 31, 1950, the total investment in such activity was nearly $4 billion,[4] and the President found it necessary to ask for an additional authorization of $2 billion. Expenditures did not necessarily imply total loss of the government's investment. Excess commodities could in varying amounts be held in reserve for future use, and could with discretion be marketed abroad or for special uses at home without greatly depressing general prices. As of January, 1950, the total admitted loss on the price support program was a little less than half a billion.[5] That amount could be expected to climb rapidly, however, with the increase in totals purchased and held.

Marketing Quotas. A major difficulty with maintaining price levels

3. Among other accounts see the *New York Times,* September 5, 1948. During the following year the potato situation grew far worse.
4. *Increasing the Borrowing Power of Commodity Credit Corporation,* House Report No. 1757, 81st Cong., 2d. sess., p. 2.
5. *Ibid.*, p. 2.



through purchasing excess produce is that as yet we have developed no effective way of limiting production to the desired amounts. The processing tax, as noted above, was held unconstitutional. At the very best, the indirect device of paying farmers to take land out of production in order to conserve the soil can have only a limited effect on production totals. Still another indirect control of production is through marketing quotas, which the Secretary of Agriculture may establish for such basic commodities as tobacco, wheat, cotton, and corn, which are extensively shipped in interstate commerce. These quotas are established if excess production is in prospect and if a certain percentage of the producers of the commodity vote for them.

Marketing quotas, it is true, do not limit production directly. The government does not prosecute a farmer who plants acreage in excess of his quota. It exercises its control indirectly by denying him the right to ship excess products in interstate commerce, and it may forbid him to ship any of his crop unless he obeys the government's mandate. He may ignore the government order and grow all of the restricted product he wishes, and no direct penalty will result; he cannot, however, market any part of it in interstate commerce in violation of the rules of quota control. Since major producers are concerned not only with home consumption but with sale, the government's strategy is usually effective. Drastic as such regulation may seem, the Supreme Court has held it constitutional. It is part of a procedure for protecting the farmer's market. It is utilized first of all for the benefit of the farmer, even though the ultimate goal may be such a balance in the national economy as will promote the welfare of all the people. In maintaining prices it operates as a kind of subsidy. Recognizing this fact, the Supreme Court remarked that

> We can hardly find a denial of due process in these circumstances, particularly since it is even doubtful that the appellee's burdens under the program outweigh his benefits. It is hardly lack of due process for the government to regulate that which it subsidizes.[6]

Marketing Agreements. In limited areas, and primarily for dairy products, minimum prices paid to producers are fixed by the Secretary of Agriculture through what are called marketing agreements or by the issuing of orders, pursuant to the Agricultural Marketing Agreement Act of 1937. For the fiscal year 1949 federal price orders were in effect in thirty-three marketing areas. They affected the price of milk valued at $720 million.[7] This direct fixing of wholesale minimum prices places more directly upon the government the responsibility for the high cost of living than does price control through the purchasing of surpluses. For this and other reasons it has not been used generally in agriculture.

The Problem of Surpluses. We are faced constantly with problems of surpluses or deficits in agricultural production. From World War I until World War II it was surpluses that gave concern. During and immediately after World War II we were concerned about deficits or the possibility of deficits. Beginning with 1949, surpluses again piled up. Even small surpluses drive prices sharply downward, and deficits drive them upward. Even with all the available controls it is nearly impossible to estimate a crop year in advance how much of a crop the people will need and will be willing and able to buy. If we could accurately estimate consumption, we still could not accurately estimate the number of acres and the amount of fertilizer and cultivation that would be needed to produce that exact amount, since weather and the effect of insect pests are unpredictable. Even under complete government control, therefore, farmers would be likely to produce either too little or too much. Without anything like complete control, they tend to produce more than can be consumed under existing market conditions. Since the 1920's we have been concerned about what to do with farm surpluses. During World War II the government had to assure the farmers that potential surpluses would be taken care of in order to insure the immediate expansion of production which the emergency required.

We operate always with an eye to the possibility of dumping surpluses abroad for whatever they will bring, although such action may get us in trouble with other countries with which we have trade treaties. Other countries resent the disturbance of their own economies by American dumping. We began the government purchase of surpluses on the theory that those of some years would be offset by the deficits of others and could be sold in deficit years to meet consumer needs. Except in emergencies, however, surpluses continue to pile up, and farmers oppose the sale of government-owned stores in competition with their current crops. The

6. *Wickard* v. *Filburn*, 317 U S. 111, 131 (1942).
7. *Report of the Secretary of Agriculture*, 1949, p. 44.

problem of disposing of government-owned surpluses, indeed, is comparable to the problem of balancing the federal budget under the theories of "compensatory fiscal policy" earlier discussed. The time for action never seems to arrive.

We have, it is true, been able to dispose of some surplus goods to feed war-devastated populations. We have used some for livestock feeding and other low-yield uses. Perishable commodities have been disposed of in considerable amounts by the simple expedient of holding them until they were no longer usable. At hearings on the 1951 appropriation for the Department of Agriculture a member of the House Committee on Appropriations discussed the problem as follows:

> For years we have been buying surplus eggs. We have been putting them in cold storage; we have been drying them; we have been storing them by the million in caves; and we have been selling them for fertilizer. And every morning there were hungry children all over this country that needed eggs for breakfast.
>
> We have let thousands of millions of bushels of potatoes rot when there were tables that did not have potatoes on them although the potato is a staple on the table three times a day throughout the world.
>
> A housewife comes into a grocery and is indignant when quoted the price of potatoes. She had been reading in the papers accounts of potatoes being destroyed by the Government, and here are potatoes at a price she claims she cannot afford to pay. She says the government is buying up eggs and selling them for fertilizer, and she cannot afford to buy eggs for her children.[8]

Production-control measures are of course calculated to prevent large surpluses. They have some effect, even though the problem remains. As for the surpluses which do develop, the Truman administration began in 1949 to advocate a different solution from buying and holding or destroying them. Announced by Secretary of Agriculture Brannan, it has been commonly known as the Brannan plan. Under this plan the government would put up enough money to insure to the farmer a fair price for his crops. It would not, however, undertake to store surpluses. Rather, it would permit the market price of commodities to sink as low as it would, on the assumption that, at some price level, all commodities would be consumed by people who needed them. The plan was immediately subjected to attack as visionary and as merely a play for votes. It was said that billions of dollars would be required to keep prices at a level to maintain parity income for farmers while permitting surplus-weighted farm products to find a market level determined by supply and demand. Congress refused to heed the pleas of the President and the Secretary of Agriculture for the plan, but it became one of the important issues of debate in the congressional elections of 1950.

Food and National Policy. In time of war, food supplies are allocated by

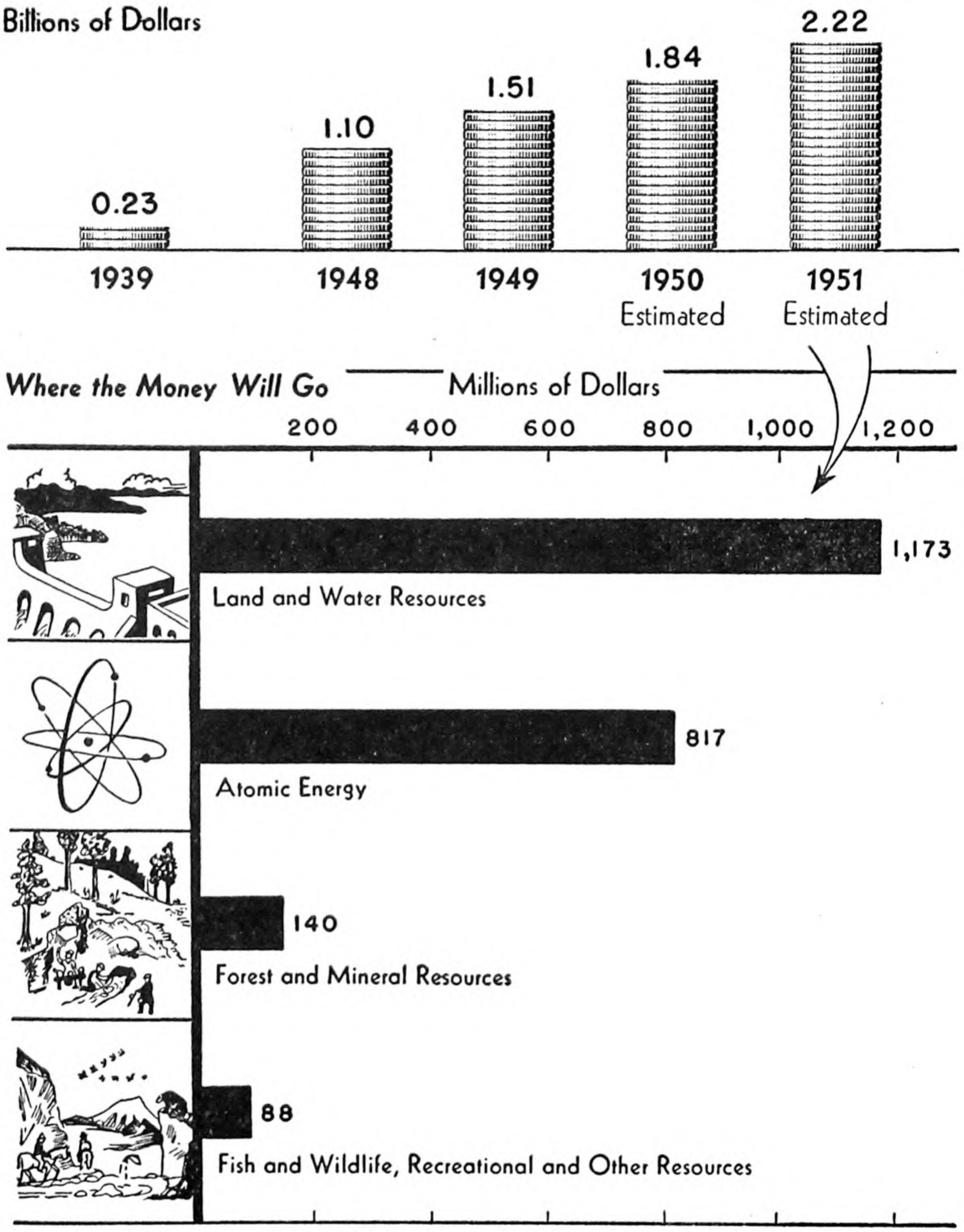
8. *Department of Agriculture Appropriations for 1951*, Hearings, House Committee on Appropriations, 81st Cong., 2d. sess., pp. 40–41.

government in terms of various features of national policy. The armed forces are well fed, however scant the supplies left for civilians. Food is shipped to or withheld from foreign countries according to military or diplomatic strategy. It is rationed to civilians at home, and its use for such purposes as the manufacture of alcoholic beverages is drastically limited. Until recent years, there has been little governmental interference with the use of food in time of peace. Early action dealt with quarantine measures and meat inspection legislation to protect the purity of food shipped in interstate commerce. Agricultural marketing legislation had some effect on distribution. After World War II, however, the government itself operated as a gigantic purchaser of food for foreign relief. Its purchases were so great that they had a considerable effect upon price and, incidentally, brought about speculation in agricultural commodities in terms of estimates or inside tips about the government buying program. The government's use of food became an important instrument in international policy through its influence on the conduct of needy countries. It was widely believed, for example, that the flow of American food to Italy was a determining factor in the Italian election of 1948, in which a strong Communist movement was defeated.

When food becomes an important instrument of national policy, private interests may have to yield some of their rights. The government found it necessary for a time to cut off the flow of grain to distillers in order that relief quotas might be met. In various other ways freedom with respect to food may yet be curtailed if national policy requires it. Certain food supplies produced primarily outside the United States, such as sugar, are subject to control by import quotas which, as they are high or low, determine the price to consumers.

THE SOIL HERITAGE

Reclamation. Until near the beginning of the present century the American people concerned themselves little about the scope of the national soil heritage. With the spreading of settlement over the entire country, however, and the end of exploration for added fertile areas, attention has turned to the problem of more complete and at the same time less wasteful exploitation of our resources. Draining swamps has long been a minor way of gaining access to hitherto unutilized richness. Far more important, however, is the rich but dry land which must be irrigated to produce crops. The western part of the country has millions of acres of such land. The mineral ingredients are present but the liquid ingredients are absent. In other parts of the country there is water in excess. The problem is to get the soil and the water together in the right proportions at the right time. For many years, and particularly since the beginning of the New Deal, the federal government has been constructing irrigation projects and power projects which develop naturally from the building of dams. The estimated construction costs of irrigation works and power facilities to June 30, 1948



ran to more than $1,250,000,000.[9] The construction costs under contracts awarded during the fiscal year 1949 alone ran to more than $139 million.[10] In 1947 the Secretary of the Interior announced a seven year program of the Bureau of Reclamation for the expenditure of more than $2 billion for the irrigation of about 4 million additional acres. He estimated at 15 million

9. *Statistical Abstract of the United States,* 1949, p. 602.
10. *Annual Report of the Secretary of the Interior,* 1949, p. 4.

acres the arid and semi-arid lands in western states for which irrigation could be provided. Immense amounts of hydroelectric power would also be made available for use in irrigated areas.

A comprehensive and expensive government program of reclamation covering a period of years displeases people who prefer to act through big corporations rather than through government and who regard "planning" as intrinsically bad. Said the Secretary of the Interior in discussing the government program,

> There is an economic superstition fostered by some theoretical economists that "planning as such, is socialistic." Planning for construction isn't socialist, capitalist, Communist or anything else. It is just good common sense. You do not build a house without plans, without surveying the ground, checking the title to the property, studying drainage, sketching in the landscaping, and considering the neighborhood. A good planning staff will pay the biggest returns in sound engineering and economical construction.[11]

In farming as in industry, there is a growing tendency toward bigness, particularly in regions where new land is to be made available for cultivation. In areas benefited by government irrigation projects, large and highly commercialized farming interests attempt to secure control of great tracts. Thus while total farm acreage continues to expand, the number of individual farms is contracting, and the tendency is toward large scale farming and away from farming as a way of life for individual farm families. The corporate owners of western farms which run to thousands of acres do not like such governmental restrictions as those limiting federal water supply to 169 acres a person. One expression of this dislike has been described as follows:

> Michael W. Straus, United States Commissioner of Reclamation, and his California regional director, Richard Boke, insist that ownership of the land resuscitated by federal pumping and irrigation must be limited to 160 acres a person. If this is not done, they fear the fertile San Joaquin may belong principally to great agricultural corporations rather than to individual farming families. California congressmen, indignant over the 160-acre limitation, attached to the recent Department of Interior appropriation bill a clause requiring the dismissal of Mr. Straus and his California representative.[12]

As the quotation implies, the federal government attempts to bring water not only to hitherto unwatered areas but also to cultivated ones where the local water supply is becoming inadequate. Such is the tragic situation in much of southern California where, in spite of extensive use of water from the Colorado River, the local water table sinks with the increase in population and growth of local industry. There is, of course, an ample water supply along the thousand-mile coast line, but its salty impurities have made it thus far unusable. The seriousness of the situation is indicated by the fact that Los Angeles officials are said to have petitioned the legisla-

11. *Congressional Record*, December 15, 1947, vol. 93, part 13, p. A4709.
12. Richard L. Newburger, "To the West, Water is Life and Death," *New York Times Magazine*, October 24, 1948, p. 60.

ture to offer a reward of $1 million to anyone with a practical idea for economically distilling fresh water from the sea.[13]

Conservation. The problem, therefore, is not merely to make new resources available but also to find ways of holding on to those already in use. By 1948, the nation that had previously been occupied with production for war had had time to give some thought to the ravages in the national heritage worked by largely unrestrained wartime production. It began to see the agricultural problems of the United States in the light of similar problems of the world as a whole. The results of reflection brought a number of books, articles, forums, and other discussions of the speed at which mankind was spending its limited agricultural resources.[14] The story was one of worldwide depletion of forests, impoverishment of soil, and destruction of ground cover. All this, in the face of the growing world population, suggested the prospect of worldwide undernourishment from food inferior in quality as well as scarce in quantity. Said a Tennessee Valley Authority report:

> Fourteen years ago we thought of both soil and food as a problem of quantity: How many bushels of corn, tons of milk, bales of cotton, etc., can our soils produce? Since then, the emerging sciences of soil chemistry and nutrition have taught us to think of quality and to ask: What is in the food we produce? For the scientists have traced an unbroken linkage between the mineral-deficient soils, deficient crops, and malnourished people. Hence, city people are beginning to concern themselves with the nutritive quality as well as the quantity and price of their food supplies.[15]

Only in degree, it is true, is the problem of agricultural conservation a new one for the American people. As early as the 1890's, Congress began to set aside remnants of the remaining national forests as areas not to be exploited by lumbermen. Under the administration of Theodore Roosevelt as President and Gifford Pinchot as head of the Forest Service of the Department of Agriculture, the program was expanded territorially and greater scientific care was provided. Since then a considerable amount of once forested land has been re-acquired and replanted or permitted to grow up once again into forested areas as an ultimate source of lumber and as cover for watersheds. Many more trees are still cut than are grown, so that the ratio must be greatly changed if ultimate disaster is to be averted, but averting it cannot be regarded as impossible if the people insist upon it.

For conservation of soil, various acts of Congress give powers to various organizations, including prominently those of the Soil Conservation Service

13. *Ibid.*, p. 60. Further on the subject of water resources see James W. Fesler (ed.), "Government and Water Resources: A Symposium," *American Political Science Review*, vol. XLIV (September, 1950), pp. 575–649.

14. Among the books see William Vogt, *The Road to Survival* (New York: Sloane, 1948) and Fairfield Osborn, *Our Plundered Planet* (Boston: Little, Brown, 1948). The Tennessee Valley Authority published an important pamphlet entitled *Food and Grass Roots: The Nation's Stake in Soil Minerals* (1947). One forum was the centenary meeting of the American Association for the Advancement of Science held in September, 1948; the other was the *New York Herald Tribune* Forum, held in October, 1948.

15. Tennessee Valley Authority, *op. cit.*, pp. 2–3.

of the Department of Agriculture. The functions of that organization are described as follows:

> The basic purpose of the Soil Conservation Service is to aid in bringing about physical adjustments in land use that will better human welfare, conserve natural resources, establish a permanent and balanced agriculture, and reduce the hazards of floods and sedimentation. This purpose is served by the development of a well-rounded coordinated program of soil and water conservation and land use. The program involves planning of individual farms and ranches, group facilities for the use and disposal of water as it affects the land, work with soil conservation districts and on water sheds or other use areas; and the application and maintenance of all known adopted conservation practices and treatments on the different kinds of land in accordance with their needs and capabilities as shown by detailed land classification surveys. It takes into account the beneficial use to which water should be put, and the development of a sound economy for each land unit or area.[16]

Here again, the movement is in the right direction, but it requires acceleration. We are still falling behind, and in some areas seem to be doing so at an increasingly rapid rate. The situation varies from section to section. Agricultural experts in Iowa are said to believe that with proper care the deep rich soil of that state should produce a hundred years from now crops comparable to those produced today. On the other hand,

> In Texas and Oklahoma, the dust is beginning to blow again. There the farmer has been trading his soil for a bumper crop. The bill will shortly be coming due, as it came due once before, in terms of human misery.[17]

With the collaboration of federal, state, and local organizations of various kinds, drastic experiments in soil surgery have been undertaken throughout the country. Using trucks, bulldozers, graders, excavators and various other kinds of machinery, groups of farm experts have operated on eroded and impoverished farms. They have changed contours, obliterated gulleys, redirected and dispersed the flow of water, and otherwise changed the layout of land so that with proper contour planting it can be utilized in the future without the disastrous waste which takes place where planting is poorly planned and where the pattern of erosion has already established itself. In the light of experiments already made, it seems possible that by similarly drastic action on a wholesale scale rather than on only a few farms scattered throughout the country dramatic achievements in soil conservation can be made.[18] The problem varies with the locality. Hundreds of thousands of farms are still owned by highly individualistic people who insist upon using their own farms in their own way without interference from their neighbors or their government. Before mass reforms can be undertaken, these people will have to be made aware of social responsibility for what they do with property they call their own.

16. *United States Government Organization Manual,* 1949, p. 277.
17. Marquis Childs, "Washington Calling," *Washington Post,* November 28, 1947.
18. For an account of various such experiments see William M. Blair, " 'Soil Surgery' Methods Stir Midwest Interest," *New York Times,* September 12, 1948.

GOVERNMENTAL MACHINERY

Congress. A discussion of agriculture which emphasizes the governmental machinery involved rather than the specific things done must consider two of the three major branches of government and to a limited extent, as illustrated above, the judiciary as well. In Congress, agricultural matters constitute in each session some of the major legislative preoccupations. Each house has a standing committee on agriculture which consists largely of representatives of farm areas and which works out and reports for enactment bills that serve agricultural interests. Each such committee is in a sense an internal congressional lobby for those interests. While like other Congresses it had its own unique agricultural problems, the experience of the Eightieth Congress was not untypical. A member of the House of Representatives summarized the work of the Eightieth Congress as follows:

> The Eightieth Congress began to carry out immediately its announced intention of getting to work on a long-range policy and program for agriculture. The groundwork of such a program has been laid in extensive hearings in both the Senate and House. A long-range price support program has been enacted and the long-term policies developed in the hearings have been applied to other legislation as it has come up for consideration.
>
> The crop-insurance program for example, has been completely revised and set up on a sound long-time basis. Basic improvements have been made in the administration and operation of marketing agreements and in the laws relating to farm labor, the national forests, the tenant-purchase program, the handling and distribution of insecticides and other agricultural chemicals. The Commodity Credit Corporation was given a permanent charter.
>
> Diseases of plants and animals, that are a threat to both farmers and consumers, have been promptly attacked by this Congress. Authority and ample appropriations were provided for fighting foot-and-mouth disease in Mexico in order to prevent its spread into this country, for the eradication of cattle grubs, for a fight against the new threat of the golden nematode disease in potatoes and tomatoes, for added safeguards against the importation of pests and diseases of shrubs and small plants, and for concerted action against destructive pests and diseases in our forests.
>
> The welfare of farm families and the improvement of farm living conditions have bulked large in the actions of the Eightieth Congress. Unprecedented appropriations have been made for the extension of rural electrification and for the development of rural roads.[19]

Legislation dealing with foreign affairs, with taxation, and with various other governmental activities must often be viewed in the light of its relation to agriculture. One of the current legislative sore-spots is the status of farmers' cooperatives. These organizations, built up with the encouragement of the federal government, are exempt from the operation of anti-trust laws and also from income taxation. The cooperatives engage in widespread business activities such as the purchase of oil, machinery, seed, fertilizer,

19. Representative Clifford R. Hope, "What the Eightieth Congress Has Done for the Farmer," *Congressional Record*, June 19, 1948, vol. 94, part 12, pp. A4423–28.

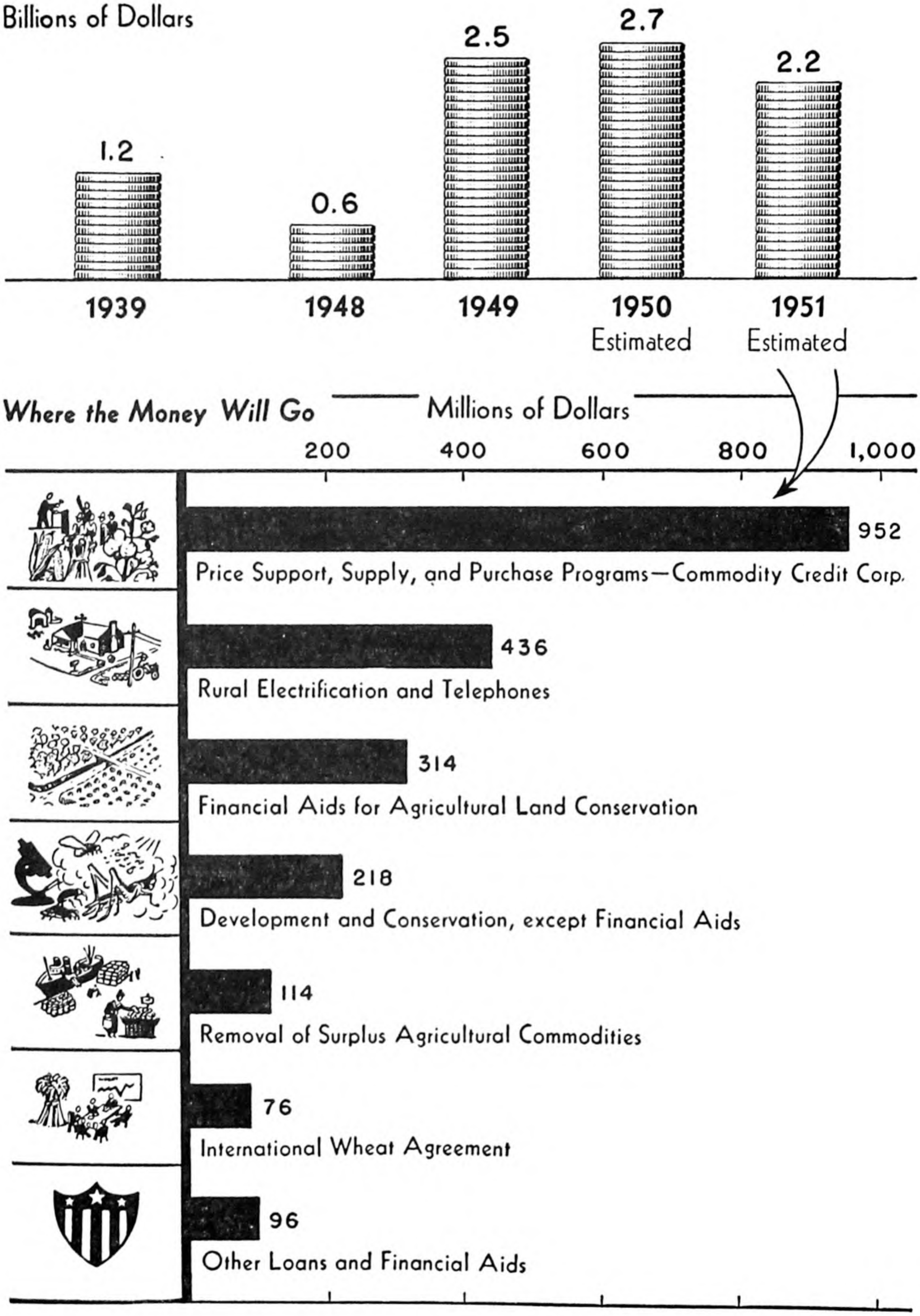
and other items at a competitive advantage over business corporations which are taxed. Business interests, although not yet successful in the matter, have created strong pressure in Congress for the taxation of cooperatives.

Lobbyist pressure in Congress against American farm interests makes itself felt in other ways. The Eightieth Congress, for example, when giving permanent status to the Commodity Credit Corporation for the purchase of crops to maintain price levels, was persuaded to include a provision barring the acquisition of additional storage bins. Because storage facilities were inadequate, this provision blocked some purchases which the government otherwise would have made — and provided a talking point for Democrats in the 1948 electoral campaign. Similarly, in the Marshall Plan for aid to western Europe, private interests secured the inclusion of a provision that wherever possible government agencies purchasing grain should utilize private channels of trade. The purpose was to secure profitable business for private interests by preventing the more economical use of the Commodity Credit Corporation as the source of agricultural supplies to be sent to Europe.

Such illustrations could be greatly multiplied. Not only must Congress understand the agricultural needs of the country and work out agricultural problems in terms of those needs; it must at critical points resist the pressures of private lobbies which are inconsistent with the public interest. Those pressures come sometimes from the lobbyists of agriculture itself and not always from non-agricultural business interests.

The President. In shifting the discussion from the legislative to the executive branch of the government in relation to agriculture, the tendency is to go directly to those parts of the executive machinery which are devoted exclusively to farm problems. So important is agriculture among government responsibilities, however, that the activities of the President himself must be taken into account. His agricultural policies and his firmness and skill or lack of them in making policy effective are highly important. He represents the entire country, by contrast with the local and therefore potentially biased representation of senators and representatives from agricultural states. If he supports a program favorable to agriculture, he therefore helps to give it the connotation of a national program rather than a program merely for specialized agricultural interests. Farmers know this and greatly value his support. The 1948 political campaign conducted by President Truman in the agricultural states was highly effective in that farmers heeded his warnings that the Republican leadership had no fundamental interest in government support for agriculture.

The problem of joint action by Congress and the President on agricultural matters is not necessarily one of fundamental differences in policy. The President, in spite of differences within his own staff, can if he chooses make up his mind exactly what he wants under given circumstances. Congress, on the other hand, bogs down from time to time under the pressure



BUDGET EXPENDITURES: AGRICULTURE AND AGRICULTURAL RESOURCES

of conflicting interests. Intervention of the President in the legislative process may be necessary to secure action — though even presidential intervention may fail to break deadlocks when agricultural interests are themselves sharply divided.

The Department of Agriculture. The greater portion of the agricultural administrative work is done through the Department of Agriculture. With its approximately 75,000 employees it is the largest civilian department of the government except the Post Office Department. For the fiscal year 1951 it sought from Congress appropriations of some $2,200,000,000. Of that amount, it is true, $952 million was planned for support of agricultural prices. Other proposed expenditures included allocations of $436 million for rural electrification and telephones, $314 million for financial aids to conservation, and $218 million for other aspects of the conservation program.[20] The Hoover Commission stated that

> The major objective of the Department is to promote the national welfare through an improved economic and social status for the farm home and the farm life:
>
> *a.* By increasing agricultural productivity and improving marketing procedures through scientific research and experiment.
> *b.* By aiding individual farmers with skilled scientific advice.
> *c.* By conserving soil, forests, range, and water resources.
> *d.* By supporting farm prices so that the efficient farmer's income maintains a parity in relation to other industries.
> *e.* By protecting producers and consumers of agricultural and related products through regulation of markets and inspection of quality.
> *f.* By giving credit assistance and protection to farmers.[21]

The primary concern of the department is in improving the welfare of the American farmer. Most of its personnel are vitally interested in farm problems. Its head, the Secretary of Agriculture, is chosen for his knowledge of agriculture and his standing with farmers generally, and not merely as the recipient of a political reward. This does not imply divorcement from politics, it is true, since farmers themselves have come to constitute one of the most politically powerful groups in the country. The Secretary is usually appointed from one of those western states in which agricultural interests are dominant. In the management of his department the Secretary is aided by an Under Secretary and an Assistant Secretary.

An important part of the work of the Department of Agriculture consists of research on soils, their qualities, their conservation, and the best methods of utilization; plant life, the conditions of its growth, and its diseases; animal life, its breeding, feeding, care, and the prevention of disease; and the nutrition of human beings and of plant and animal life. These research activities are grouped in the department in an overall organization called the Agricultural Research Administration. Within that administration are

20. Bureau of the Budget, *The Federal Budget in Brief*, Fiscal Year 1951, p. 23.
21. *Department of Agriculture*, House Doc. No. 80, 81st Cong., 1st sess., p. 2.

bureaus of agricultural and industrial chemistry, animal industry, dairy industry, entomology and plant quarantine, human nutrition and home economics, plant industry, soils, and agricultural engineering, the Office of Experiment Stations, and an agricultural research center. The powers and functions of these agencies are prescribed by various statutes enacted over a number of years and by administrative orders.

Various other important agencies lie outside this grouping. The Commodity Exchange Authority, for example, attempts to curb evil practices in the marketing of agricultural commodities. Among other things, it regulates commodity exchanges somewhat as the Securities and Exchange Commission regulates security markets. Another agency, known as the Extension Service, cooperates with schools and colleges in providing agricultural education for farm people. The Farm Credit Administration incorporates many agencies having to do with the provision of agricultural credit. Among these are federal land banks, the Land Bank Commissioner, federal intermediate credit banks, production credit corporations and associations, banks for cooperatives, and a Regional Agricultural Credit Corporation. Another such agency not yet amalgamated with the Farm Credit Administration is known as the Farmers Home Administration. A Federal Crop Insurance Corporation provides crop insurance against various unavoidable production hazards. The Forest Service has custody of vast forests to which the United States government holds title.

Various other functions are organized in the Production and Marketing Administration. One of its branches formulates and executes agricultural conservation programs to prevent erosion and improve the productivity of agricultural land. Another engages in the distribution of food. Another has jurisdiction with respect to farmer's interests in the storage and transportation of products. Another engages in market research. Within this agency is included the important Commodity Credit Corporation, the financial agency which carries out the lending, buying, selling, storage, transportation, subsidy, and price support activities of the department.

The Rural Electrification Administration was organized to extend electrification throughout farm areas where private interests were unwilling to venture their capital at rates low enough so that farmers could purchase electricity and electrical equipment. The agency makes loans for rural electrical systems and for the purchase and installation of electrical appliances. The Soil Conservation Service, as its title indicates, administers the statutes on irrigation, drainage, and related activities. Serving the department as a whole, a Bureau of Agricultural Economics collects and disseminates agricultural statistics on a great variety of subjects.

The Department of the Interior. Whereas the Department of Agriculture is devoted exclusively to agricultural matters, the Department of the Interior is concerned with them only in part. It is a loosely organized department with a tendency in recent years to emphasize the conservation of resources of all kinds. Its policies often conflict with those of the Depart-

ment of Agriculture, and political clashes between the two have been frequent and persistent. For many decades, the Department of the Interior was concerned with getting government-owned lands into private hands as quickly as possible, whereas Agriculture was concerned with the conservation of forests, other plant life, and the soil itself, and with the adjustment of agricultural production to market demand in such a way as to secure a fair income for American farmers. Even today Interior's Bureau of Reclamation is interested in making new agricultural resources available on the largest possible scale whereas Agriculture is still concerned with limiting production to maintain prices and the economic welfare of farmers. Interior's Bureau of Land Management administers grazing on hundreds of thousands of acres of federal range and operates in the midst of the conflict between the stock men who feel entitled to all that the soil will yield and the conservationists who believe that the soil heritage belongs to the American people and not merely to those who can exploit it most promptly. The National Park Service administers the national parks and takes care of the forests in the park areas much as other national forests are taken care of by the Forest Service of the Department of Agriculture. Interior's Fish and Wild Life Service engages in research and other activities for the preservation of wild life and administers various related conservation statutes.

Other Agencies. Congress, the President, and the two departments mentioned above are the principal federal agencies having to do with agriculture, though many others are more or less important. The federal courts not only pass upon the constitutionality of acts of Congress but also interpret the statutes Congress enacts. The major agencies dealing with internal transportation and foreign trade inevitably touch on agriculture in some way. The State Department participates in the making of such treaties as deal with the subject. It participates also in other negotiations in the field. It has had primary responsibility for working out reciprocal trade agreements with other countries and for lowering tariffs affecting agricultural products as well as other articles of commerce. The Economic Cooperation Administration, which is concerned primarily with the rehabilitation of western Europe, exercises an important influence upon agriculture through the quantity and kinds of materials shipped abroad. The United Nations Food and Agriculture Organization, a substantial proportion of whose expenses are paid by the United States, has an important relation to both the agriculture of the United States and of the rest of the world.

Various other organizations have some impact upon agricultural welfare. Enough has been said, however, to show that the regulation and control of agriculture in innumerable ways has become an integral and basically important activity of the federal government. Government, agriculture, and the public welfare are so interrelated as to be inseparable. The time has long passed when we can think of agriculture without also thinking of government.

References

Gladys Baker, *The County Agent* (University of Chicago Press, 1939).
Carleton R. Ball, *Federal, State and Local Administrative Relationships in Agriculture* (University of California Press, 2 vols., 1938).
Donald C. Blaisdell, *Government and Agriculture* (Farrar & Rinehart, 1940).
Arthur P. Chew, *Plowshares into Swords; Agriculture in the World War Age* (Harpers, 1948).
John M. Gaus and Leon O. Wolcott, *Public Administration and the United States Department of Agriculture* (Public Administration Service, 1940).
Albert L. Meyers, *Agriculture and the National Economy* (Government Printing Office, 1940).
Edwin G. Nourse, et al., *Three Years of the Agricultural Adjustment Administration* (Brookings, 1937).
Fairfield Osborn, *Our Plundered Planet* (Little, Brown, 1948).
George W. Rightmire, *Federal Aid and Regulation of Agriculture and Private Industrial Enterprise in the United States* (Ohio State University Press, 1943).
Tennessee Valley Authority, Department of Agricultural Relations, *Food at the Grass Roots: The Nation's Stake in Soil Minerals* (T.V.A., 1947).
William Vogt, *Road to Survival* (Sloane, 1948).
Walter W. Wilcox, *The Farmer in the Second World War* (Iowa State College Press, 1947).
M. L. Wilson, *Democracy has Roots* (Carrick and Evans, 1939).

29

Government and Labor

The same trend we observed in the relations of government to business and agriculture is also apparent for labor. Business has become more and more a concern of the federal government as mass production and mass distribution have involved the welfare of all the people and as powerful corporations have become the major instruments of economic power. Similarly, agriculture has become more and more the concern of the federal government as the welfare of farmers has entangled itself more and more intimately with the welfare of all and as the pricing and distribution of food has become a major instrument of national and international policy. Labor, in its turn, has won comparable governmental attention as its vital part in the production and distribution of economic goods has become increasingly apparent and as its organization into gigantic units of power has made it often the critical factor in achieving the national well-being. For labor as for business and agriculture, present relationships with government are the product of many years' gradual evolution. The subject needs to be introduced, therefore, in terms of its historical background.

HISTORICAL BACKGROUND

The Early Position of Labor. During the early years of American history, labor received even less attention from the federal government than business and agriculture. Unless he was a slave or an indentured servant, the worker was regarded as a free agent whose well-being depended upon his own industry and ingenuity. Relatively few early American citizens had any expectation of remaining mere laborers permanently. Most of them were concerned with getting enough money to buy farms or to set themselves up in business. It was not until the last quarter of the nineteenth century that labor became highly group conscious and began to make itself felt through organization.

By 1884, labor had made itself politically effective to the extent of securing establishment in the Interior Department of a bureau for the collection of labor statistics. Four years later, with an eye on the independent position of the Department of Agriculture, it succeeded in having

that bureau transformed into a Department of Labor, but the department was headed only by a commissioner and consisted for some time of little more than a statistical and publicity agency operating in the interest of labor. In 1903 it was merged in the Department of Commerce and Labor, which was headed by a Secretary with Cabinet rank. It was not until 1913 that it was divorced from Commerce and reestablished as a Department of Labor with its secretary a member of the President's Cabinet.

For a long period, the traditional attitude in the United States toward the exercise of power by organized labor involved a great deal of hostility or, at any rate, it stirred little sympathy. The common law tradition that such organization was punishable as conspiracy faded out, but the conception that labor had a positive right to organize, and that such organization met a public need, developed slowly. American business interests, which were accustomed to having their own way without interference by their employees, were naturally hostile to unionization. Judges who were steeped in the thinking of the common law, and who were or had been as counsel the familiar associates of aggressive businessmen, shared the dislike. It is not surprising, therefore, that judges, both federal and state, made wide use of their equity powers to enjoin strikes, boycotts, and other types of labor union activities when industrious counsel for business interests could present evidence of illegality. Use of injunctions against labor was facilitated by the Sherman Anti-Trust Act of 1890, which had been drafted to curb business combinations but which, to the indignation of labor, was turned against labor organizations as well. The most famous of the early injunctions was that issued in a federal court in 1894 against the American Railway Union and its officers, which effectively broke up what was known as the Pullman strike against the railroads.

Organized labor struggled for many years to free itself from the restrictions placed upon it by interpretation of the Sherman Act and from the injunctive power of federal courts generally. It thought it had escaped from the toils of the anti-trust measure with the inclusion of certain provisions in the Clayton Act of 1914, but it was subsequently disillusioned by narrow judicial interpretation of those provisions. It did not fully escape until after the change in membership of the Supreme Court under the New Deal. Against federal injunctions generally, it did not secure comprehensive relief until the Norris-LaGuardia Act of 1932.

Other important battles against judicial action were fought before the beginning of the New Deal period. Around the turn of the century, states began to enact more and more measures regulating hours, wages, and working conditions. Voicing what now seems a fair and realistic conception of liberty, the Supreme Court in 1905 held unconstitutional a New York statute limiting employment in bakeries to sixty hours a week and ten hours a day. Such a measure, the majority contended, interfered with freedom of contract and therefore with the prohibition of the Fourteenth Amendment against taking liberty without due process of law.[1] The Court

1. *Lochner* v. *New York*, 198 U.S. 45 (1905).

gradually shifted away from this extreme position, but in general it remained opposed to the regulation of wages. In 1923, for example, it held unconstitutional, as a violation of the due process clause of the Fifth Amendment, an act of Congress passed to establish minimum wages for women in certain employments in the District of Columbia.[2]

Again, both Congress and a number of states attempted in certain fields to insure the right of labor to bargain collectively by attempting to prevent discrimination against workers because of union membership. The statutes in question outlawed what are commonly called "yellow dog contracts." A yellow dog contract is so called because it resorts to what labor regards as the unpardonable device of making it a condition of employment that the worker will not become or remain a member of a union during the course of his employment. As long as such contracts are enforced, they prevent unionization of the workers and make collective bargaining impossible. The Supreme Court, however, held that federal and state measures outlawing such contracts took the liberty of the employer without due process of law.[3] Such contracts were again outlawed by the Norris-LaGuardia Act, however, and this time, in the New Deal atmosphere, the restriction was upheld.

Other labor measures enacted by Congress and state legislatures, and court decisions relating to them, were important, but enough has been said to illustrate the general character of pre-New Deal relationships between government and labor. Unions had won considerable bargaining strength in spite of opposition, and a considerable amount of political power. They have been able to secure in the face of heavy opposition the enactment of various measures in their interest. Within government itself, the strongest resistance was in the judiciary, which gave way only slowly in the face of changing public opinion and the repeated enactment of legislative measures benefiting labor.

The New Deal. For labor as for business and agriculture, the New Deal brought tremendous changes in relations with government. Virtually for the first time, government fully recognized that to achieve national prosperity business, agriculture, and labor had to work together, that their interests, however diverse in some ways, were inseparable, and that all prominent groups must share in social benefits if a healthy social order was to be maintained. The government's program called for shorter working hours, both to enable the worker to live a richer life and to divide employment among a larger number of workers. It called for higher wages. It called for retirement systems providing adequate retirement incomes. The theory was that purchasing power would be increased, more goods would be sought by prospective purchasers, more would be produced, and more workers would be employed at better wages in a continuing upward spiral. Under the National Industrial Recovery Act, the federal government at-

2. *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923).
3. *Adair* v. *United States*, 208 U.S. 61 (1908) and *Coppage v. Kansas*, 236 U.S. 1 (1915).

tempted to enforce certain basic provisions for hours, wages, and working conditions, and sought to insure the right of collective bargaining in solving common problems and working out conflicts between employers and employees.

In 1935 the Supreme Court jeopardized the labor program by invalidating important provisions of the National Industrial Recovery Act, and Congress permitted the statute to expire. Utilizing the experience already gained, however, Congress enacted a new labor measure, the National Labor Relations Act, commonly known as the Wagner Act. Its purpose was to guarantee to labor in industries in interstate commerce or affecting it the right to bargain collectively with employers. It was based on the belief that such bargaining would prevent obstructions to interstate commerce through strikes and that in promoting the welfare of labor it would promote the welfare of the country as a whole. The act prohibited employer practices which might interfere with its policy, and to enforce the statute, it created an independent regulatory commission called the National Labor Relations Board. The board was authorized to hold or supervise elections to determine collective bargaining units and to pass on complaints of violations of workers' rights. After the fashion of the Federal Trade Commission, it was authorized to issue cease and desist orders against unfair labor practices. The board was designed exclusively to protect workers, not employers. Its jurisdiction was limited in that government workers were not included; neither were railroad employees who, through the unique features of railroad transportation, were protected under an earlier statute and were under the jurisdiction of the National Mediation Board.

In a series of important decisions beginning in 1937,[4] the Supreme Court upheld the statute as a legitimate regulation of interstate commerce and interpreted it and the commerce clause of the Constitution so broadly as to reach far down into the process of production, a long way from the stage of actual shipment in interstate commerce. In so doing, the Court abandoned earlier restrictive interpretations of the commerce clause and came close to accepting the theory that interstate commerce was not merely a matter of individual shipments across state lines but included the vast network of business relationships which had repercussions across state lines whether or not actual shipment was involved. In upholding the statute it ignored the continuing protests of employers that a valid statute ought to protect not merely one but both parties to labor disputes.

While many labor problems could be safely left to collective bargaining when adequately supervised by government, there were certain areas in which government itself prescribed the conditions of employment. It did so, for instance, in the Fair Labor Standards Act of 1938 which, for workers in industries in or affecting interstate commerce, prescribed or authorized the prescription of minimum wages and maximum hours and abolished child labor. This measure also was broadly interpreted and upheld by the

4. The first important case was *National Labor Relations Board* v. *Jones Laughlin Steel Corporation.* 301 U.S. 1 (1937).

Supreme Court.[5] In one case, for example, the court held that it was a legitimate regulation of interstate commerce to set the hours and wages of maintenance workers in a factory building. The principal connection of the building with interstate commerce was that most of the tenants were manufacturing goods for shipment in interstate commerce. The workers affected by the statute were not employed in the manufacture of goods at all, but merely took care of the building in which manufacturers operated. Yet the Court found their relation to interstate commerce close enough to justify regulation of their employment under the commerce power.[6]

Other cases have involved even broader interpretation of the commerce clause to justify federal protection of the rights of labor. Such cases illustrate the sweeping change in the attitudes of the federal courts under general New Deal thinking about the rights of labor. It should be emphasized, however, that the change in thinking was not solely the product of any governmental administration. The change had been in progress for a number of years as people became gradually aware of the more fundamental changes which were taking place in the economy. As mass production industrialism became the dominant characteristic of the economy, the individual worker lost most of his bargaining power on hours, wages, and working conditions, and even on the selection of his employer. As more and more production fell into the hands of big corporations, leaving one employer for another became difficult and often practically impossible. The bargaining power of the employer was so tremendous that the individual worker hardly counted at all. In guaranteeing the right of workers to bargain collectively so as to make themselves felt, the federal government was attempting to equalize bargaining power between the opposing forces of employers and employees in the hope of promoting the welfare of each and of society as a whole. Its direct guarantee of minimum wages and other rights to labor was calculated to act as a corrective on matters where even collective bargaining seemed inadequately to protect the rights of many workers.

World War II. World War II changed temporarily the pattern of labor relations but brought few permanent modifications. Apart from a seemingly intensified hostility between employers and employees, almost all large scale production was geared to the war effort so that hundreds of thousands of workers, though nominally privately employed, were indirectly working for the government. Because labor stoppages interfered or threatened to interfere with the conduct of the war, they incurred popular disapproval which they do not necessarily incur in times of peace. Since the economic program of the government called for resistance to inflation, it had to curb wage increases as well as price increases. Restraints upon wages were hard to maintain because of the demand for labor which was created by scarcity of workers and the tremendous production program. A

5. The first important case was *United States* v. *Darby,* 312 U.S. 100 (1941).
6. *Kirschbaum* v. *Walling,* 316 U.S. 517 (1942).

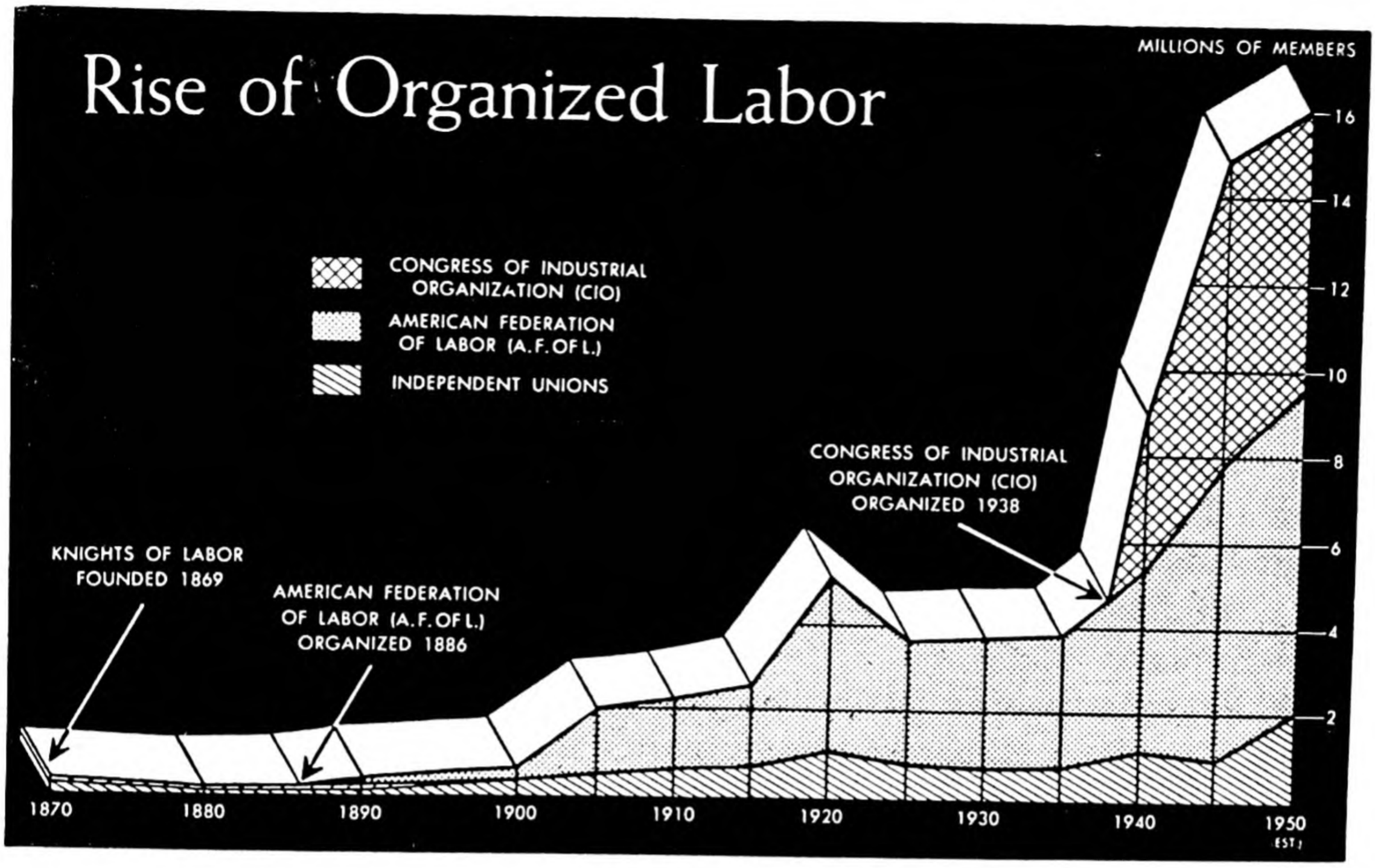
National War Labor Board was given responsibility for holding the line on wages, with such yielding here and there as was necessary to meet serious grievances and prevent strikes. The War Manpower Commission aided in allocating labor to points where it was most needed for war purposes and sought to prevent the pirating of workers from one agency to another.

Irritated by recurrent strikes, Congress in 1943 passed over the President's veto the War Labor Disputes Act for the purpose of preventing strikes during wartime. The statute authorized the President to take over and operate plants producing for war purposes when continued production was threatened by strikes or other labor disturbances. Once the plants were taken over, strikes and other activities which might interfere with production were prohibited. This power was used on various occasions, and the possibility of its use may well have had a restraining effect under other circumstances.

While some people advocated prohibiting strikes against private employers, public sentiment never supported such a measure. Although government contracts were let in such a way as to curb the wartime profits of corporations, it was nevertheless felt that to prevent workers from striking would unduly subordinate them to the whims of private interests. The statute did require a "cooling off" period of thirty days before a strike could be called and the taking of a secret ballot by the National Labor Relations Board to discover whether employees were ready to sanction an interruption of war production. On the other side of the picture, there was complaint that the statutes gave the unions undue power over workers who, for economic, patriotic, or other reasons, wished to engage in war production but who did not desire union membership. Such persons were often compelled to join unions as a condition of employment and to pay high initiation fees and dues. The equities in the matter were never adequately worked out. During the war, both organized labor and employers exercised a great deal of self-restraint in labor matters in order to avoid interference with war production. Each group seems to have come out of the war determined to intensify the struggle for the betterment of its own position.

THE STATUS OF UNIONS

Organization and Leadership. There are some sixteen million organized workers in the United States. Of these the American Federation of Labor claims eight million and the Congress of Industrial Organizations six million. The unaffiliated unions which have the other two million include the powerful railway unions and the United Mine Workers, which at times has been a member of each major group but follows the leadership of John L. Lewis whatever its affiliation. The AFL was organized in 1886 and developed under the leadership of Samuel Gompers, who served as its president until his death in 1924. The CIO was formed in the middle 1930's in a secession movement led by John L. Lewis. The two groups of unions differ somewhat in organization. The CIO is the more highly centralized, and left



wing tendencies seem to crop up more frequently in it than in the AFL. The differences, however, are not fundamental, and presumably would not keep the two groups apart were it not for personal rivalry among the several leaders. It is said that "The controversy which split the AFL in the middle thirties and resulted in the formation of the CIO was very largely a clash over personality and method rather than fundamental principles."[7] To a considerable extent the split between the two organizations marked a struggle over the spoils of power and prestige which were so tremendously enhanced by the government guarantee of the right of labor to bargain collectively. The leadership which had been in some degree responsible for improving labor's position now became intoxicated with the results. Furthermore, like men in other walks of life who suddenly reach their goals, leaders proved unable to exercise their power moderately and wisely in the public interest. It was the arrogance of labor leadership as well as the stubbornness and selfishness of employer groups that brought about recurrent labor conflicts.

During the New Deal period, labor received from the Supreme Court a degree of protection comparable to the aid given it by Congress and the President. The Court shifted its line on interpretation of anti-trust laws and refused to apply them to combinations of labor even when labor blocked production merely because of jurisdictional struggles between unions. It refused also to apply anti-trust laws to labor activities which were nothing more than racketeering. It protected against state legislation

7. Charles C. Killingsworth, "Organized Labor in a Free Enterprise System," in Walter Adams (ed.), *Structure of American Industry* (New York: Macmillan, 1950), p. 548.

labor's right of peaceful picketing in pursuit of lawful ends, holding that such picketing was part of the freedom of speech and of the press which was protected by the Constitution.[8] Such a right could be denied, the Court declared, only when it was set in a background of violence.[9] The Court also held that a state had unconstitutionally denied freedom of speech when it forbade a paid labor organizer from another state to solicit membership for his union without first securing an organizer's card from a state officer.[10] In short, these and other decisions indicated that the Supreme Court had completely abandoned its position of earlier years, when it had almost always seemed able to find some way of deciding cases against labor. Now, acting in harmony with recent federal statutes and with the broad program of the federal government, it defended to the fullest the right of labor to use its organized power in competition with the similarly organized power of employers.

Abuses in Labor Strategy. Although many employers welcomed governmental machinery which supported collective bargaining with labor as a device to preserve industrial peace, others complained bitterly about government coercion, about the one-sidedness of federal legislation that protected workers and not employers, and about the abuses on the part of labor which took shelter behind the federal program. Unions vary considerably in the extent to which they are controlled by top leadership. Whether the control is tight or loose, a leader must stay in favor with his constituents if he is to remain in power. In order to maintain his position, he may ignore the misconduct of union members or even take the lead in sponsoring strategy opposed to the public interest and perhaps to the long range interest even of the union itself. During the New Deal period various abuses irritated large sections of the public which in general approved of labor legislation, and gave the enemies of such legislation excuses for denouncing it.

One of the abuses commonly characterized as labor racketeering was illustrated by the New York local union which insisted on collecting toll from trucks driven into New York from New Jersey by members of other unions. In the language of a Supreme Court justice, members of the union "lay in wait for trucks passing from New Jersey to New York, forced their way onto the trucks, and by beating or threats of beating the drivers procured payments to themselves from the drivers or their employers of a sum of money . . . said to be the equivalent of the union wage scale for a day's work."[11] When the abuse continued after the Supreme Court held that it was not forbidden by existing anti-racketeering legislation, Congress had to amend the law to make it applicable.

Another abuse was what is commonly called "featherbedding," a practice

8. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).
9. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287 (1941).
10. *Thomas* v. *Collins*, 323 U.S. 517 (1945).
11. Chief Justice Stone dissenting, *United States* v. *Local* 807, I.B.T., 315 U.S. 521, 539 (1942).

which organized labor has frequently used to protect itself against labor-saving machinery and other devices which reduce the number of workers needed for a given amount of work. The union may insist that the full number of workers receive pay, whether they are needed or not, as a condition of working at all. The best publicized of recent offenders has been James C. Petrillo, head of the American Federation of Musicians. As virtual czar of this union, Petrillo has been able to collect an enormous sum in payment for unneeded musicians in his attempt to protect the union against losses from the use of radio, records, juke boxes, and other devices. In 1946, Congress forbade attempts to coerce unnecessary employment in broadcasting.[12] The statute was limited in scope, however, and in January, 1948, the restrictive power still exercised could be thus described:

> Already Petrillo has barred members of his union from (1) making records; (2) making transcriptions, which can be played over the radio; (3) participating in television broadcasts — so you can't see Koussevitsky except in an auditorium; (4) participating in a regular (AM) broadcast which is relayed over an FM station; (5) participating in international pickups of musical programs, so that a United States network cannot engage, say, in an exchange arrangement with the British Broadcasting System.[13]

Some of these issues were later compromised at the expense of the buying public.

Changes in technology do threaten unemployment for large numbers of musicians as it becomes possible to reach millions of people by direct broadcasting, rebroadcasting, and the use of records. Petrillo poses a legitimate question when he says, "we know the public always gets caught in the middle of these things. But what are we supposed to do, go on cuttin' our own throats?" [14] Even so, a ruthless and highly paid — $46,000 a year — labor leader who wields such tremendous power over public entertainment creates great popular dissatisfaction with the scope of labor power.

Shortly after the close of World War II, certain labor leaders, and more particularly lawyers for unions, frightened or gave excuse for pretense of fright on the part of employers and government officials by planning suits for an estimated $6 billion in back pay for workers. The Fair Labor Standards Act not only prescribes maximum hours of employment but also provides for extra pay for overtime. The statute did not clearly prescribe when "time" began to run for the individual worker. Workers in mines contended, not unreasonably, that work time for them should include not merely time spent at the point of underground operations but also that spent in descent underground to the point of operations. The Supreme Court upheld their contention.[15] A suit was then brought to determine whether workers were entitled to payment from "portal to portal" even when employment was not

12. See *United States* v. *Petrillo,* 332 U.S. 1 (1947).
13. J. A. Livingston, "Hartley Sharpens His Saw to Cut Petrillo Off Limb," *Washington Post,* January 1, 1948.
14. Jack Gould, "Portrait of the Unpredictable Petrillo," *New York Times Magazine,* December 28, 1947, p. 11.
15. *Tennessee Coal and Iron Railroad Co.* v. *Muscoda Local,* 321 U.S. 590 (1944), *Jewell Ridge Coal Corporation* v. *Local,* 325 U.S. 161 (1945).

underground. In a case involving a pottery company, the Supreme Court held that they were entitled to such payment.[16] The decisions, with the threat of innumerable suits of the same kind for back pay, came when businessmen were still worrying about a possible depression in the transition between war and peace and when government officials were concerned with concluding the government's contract obligations for war supplies produced by private manufacturers. Many employers argued that if their war costs were increased by portal-to-portal payments those costs must be assumed by the government in the process of settling its debts. The issue may well have played a part in the election of a Republican Congress in November, 1946. In any event, it provided a point of attack upon labor at the ensuing first session of the Eightieth Congress. After hearings which on the whole gave unfavorable publicity to the claims of labor, Congress enacted a measure exempting employers from liability under existing statutes for payment of workers for "walking, riding, or travelling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." [17]

Labor's conduct in various other matters created ill will. Strikes often resulted from jurisdictional quarrels between rival unions, each claiming the right to unionize particular establishments. Such strikes did not necessarily involve grievances against employers but were carried on without concern for the welfare of employers or the general public. Boycotts by labor were likewise carried to an extreme. If the right to strike is to be preserved as an effective weapon, the right to boycott the goods of the employer immediately involved must likewise be preserved. So, also, an employer must not be permitted to defeat strikes by farming out his work temporarily to other plants. Labor went so far, however, in its determination to boycott any business having anything to do with plants that were out of favor with particular unions that relatively innocent businesses, and the public generally, were made to suffer for no adequate reason. Again, various abuses took place in connection with maintenance of the closed shop. A closed shop is an establishment in which only union men can be hired or retained in employment. Each worker must pay initiation fees and dues, however burdensome. He must so conduct himself as to avoid dismissal from the union. If he is dismissed, he likewise loses his job. As a result, many individualistic workers found themselves the victims of union tyranny.

Finally, in controversies over wages, welfare funds, and other matters, some union leaders, with little evidence of concern for the public welfare, showed themselves willing to call strikes which in a short time would tie up the entire national economy. Railroad leaders were among them. John L. Lewis, with his virtually dictatorial power over the United Mine Workers, was ready at almost any time to provide an outstanding example. Although the close of the war revealed a general weariness with tightly knit govern-

16. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).
17. 61 Stat. 86.

ment controls, the people were similarly weary of the exercise of comparable power by union leadership. The way was paved for broad and drastic restrictions of the rights of labor.

The Taft-Hartley Act. The Republican-dominated Eightieth Congress, which assembled in 1947, gave ear to all the grievances against labor and against the National Labor Relations Act which, implemented by the National Labor Relations Board, guaranteed to labor the right of collective bargaining. It expressed its reaction in the Labor-Management Relations Act of 1947, commonly known as the Taft-Hartley Act. In presenting the bill to the House of Representatives, the House Committee on Education and Labor attempted to show that both workers and employers suffered under the existing regime.[18]

The committee outlined as follows the accomplishments of the bill.

> (1) It abolishes the existing discredited National Labor Relations Board, and creates in lieu thereof a new board of fair-minded members to exercise quasi-judicial functions only.
>
> (2) It establishes a new official exercise of various prosecuting and investigative functions under the National Labor Relations Act, to be entirely independent of the Board.
>
> (3) It requires the Board to act only upon the weight of credible legal evidence, and it gives to the courts of the United States a real, rather than a fictitious, power to review decisions of the Board.
>
> (4) It outlaws the closed shop and monopolistic industry-wide bargaining.
>
> (5) It exempts supervisors from the compulsory features of the National Labor Relations Act.
>
> (6) It imposes on both parties to labor disputes the duty of bargaining and requires that the employees themselves be given a voice in the bargaining arrangements through the device of providing for a secret ballot of the employees on their employer's last offer of settlement of the dispute.
>
> (7) It protects the existence of labor organizations which are affiliated with one of the national federations.
>
> (8) It prohibits certification by the Board of labor organizations having Communist or subversive officers.
>
> (9) It prescribes the rights which an individual member of a labor organization can justly claim of his union, and gives him protection in the exercise of those rights.
>
> (10) It outlaws sympathy strikes, jurisdictional strikes, illegal boycotts, collusive strikes by employees of competing employers, as well as sit-down strikes and other concerted work interferences conducted by remaining on the employer's premises.
>
> (11) It outlaws strikes to remedy practices for which an administrative remedy is available under the bill or to compel an employer to violate the law.
>
> (12) It outlaws mass picketing and other forms of violence designed to prevent individuals from entering or leaving a place of employment.
>
> (13) It outlaws picketing of a place of business where the proprietor is not involved in a labor dispute with his employees.

18. *Labor Management Relations Act, 1947,* House Report No. 245, 80th Cong., 2d sess., pp. 4–5.

(14) For unlawful concerted activities it gives the person injured thereby a right to sue civilly any person responsible therefor.

(15) It prescribes unfair labor practices on the part of employees and their representatives as well as by employers.

(16) It creates a new and independent conciliation agency.

(17) It removes the exemption of labor organizations from the anti-trust laws when such organizations, acting either alone or in collusion with employers, engage in unlawful restraints of trade.

(18) It makes labor organizations equally responsible with employers for contract violations and provides for suit by either against the other in the United States district courts.

(19) It provides a means for stopping strikes which imperil or threaten to imperil the public health, safety, or interest.

(20) It guarantees to employees, to employers, and to their respective representatives, the full exercise of the right of free speech.[19]

During the course of the bill through Congress, labor and its friends denounced it as an attempt to destroy the gains of labor made in recent years and to bring about virtual enslavement. Behind the scenes rumbled the threats of defeat at the polls for members of Congress who would enact such a measure. Nevertheless both houses passed the bill by large majorities, and many Democrats joined in to swell the totals. President Truman responded with an indignant veto message. He agreed that some legislation was necessary. He heartily condemned abuses by unions and employers. He denounced the enacted measure, however, declaring that it would cause more rather than fewer strikes, that it would contribute neither to industrial peace nor to economic stability and progress, and that it "would be a dangerous stride in the direction of a totally managed economy."[20] Both houses of Congress triumphantly passed the bill over the veto by more than the necessary two-thirds majority.

The Taft-Hartley Act is extremely hard to appraise. As yet it has neither enslaved labor as labor leaders predicted nor constituted the panacea for the ills of labor-management relations as its sponsors claimed. It is a long and intricate measure with innumerable provisions that require judicial interpretation before their meaning can be made clear. It went into effect at a time of great labor scarcity, when employers were much more interested in securing workers by almost any means than in testing their legal rights under the law. For a time employers were widely suspected of making labor contracts which ignored various of their rights under the new statute, rights which in a later period of less than full employment they might insist upon. It is clear that the arrogance of power-hungry labor leaders was sometimes curbed. The injunction was partially restored to use, but only by the government agency and not by private employers. Various labor controversies which otherwise might have led to jurisdictional strikes were settled without strikes which would have been injurious both to employers and to the public. In the main, however, the statute needs to run longer before drastic change and greater variety in the conditions

19. *Ibid.*, pp. 5–6.
20. *Congressional Record*, June 20, 1947, vol. 93, part 6, p. 7485.

of employment can disclose its potentialities. It may be that in the long run the outstanding achievement of the act will be the aid which it gave to labor unions, hostile though the unions were, in eliminating Communists from among their leaders. This it did effectively in most instances by withholding from unions the benefits of collective bargaining legislation until their officers had filed non-Communist affidavits.[21]

In the main, labor refused to admit that there was any good in the Taft-Hartley Act except as it embodied provisions of the Wagner Act which it supplanted. In the election of 1948, labor fought to defeat senators and representatives who had voted for the measure. The issue was merged with others in the campaign, and it is impossible to tell how much influence labor had in eliminating a substantial bloc of its opponents. With the re-election of President Truman, who carried the denunciation phrased in his veto message into the presidential campaign, labor listed confidently the repeal of the Taft-Hartley Act as one of its first demands. Enactment of the measure proved, however, to have been something more than the vindictive action of conservative Republicans, which labor thought it to be. Even though the Truman administration once again had a majority in Congress, an alignment of conservative Democrats with Republicans prevented repeal of the measure. Although even the sponsors of the act admitted that it could be improved by amendment, the advocates of repeal and the advocates of amendment were unable to get together. In the spring of 1950 President Truman attempted to modify a bad feature of the act — a division of power between the National Labor Relations Board and its general counsel — by a reorganization order, but the Senate defeated the plan. The issue of the Taft-Hartley Act therefore went over into the election campaign of 1950 with no generally acceptable solution in sight.

GOVERNMENTAL MACHINERY

Congress. Handling labor problems, like handling the problems of agriculture, requires the participation of all branches of the government. As the political power of labor has grown and as it has become more fully realized that the welfare of the country as a whole is involved with the welfare of labor, Congress has given more and more of its time to labor problems. The standing committees with jurisdiction over labor problems are a little less highly specialized than those for agriculture. The connection with other subject matter is indicated by the names of the committees, in the Senate the Committee on Labor and Public Welfare and in the House the Committee on Education and Labor. Such enactments as the Norris-LaGuardia Act of 1932, the National Labor Relations Act of 1935, the Fair Labor Standards Act of 1938, and the Labor-Management Relations Act of 1947 illustrate major legislative activities in the field. Labor is more outspoken in its denunciation of legislators voting against its interests than is

21. The Supreme Court upheld the requirement of non-Communist affidavits May 8, 1950, in *American Communications Association, CIO* v. *Douds,* 70 S. Ct. 674.

business or agriculture, and in general it campaigns more specifically to defeat its enemies. Such activity inevitably makes Congress highly sensitive to labor questions. This does not necessarily mean, however, that labor is more effective because of its political techniques than are other major interest groups.

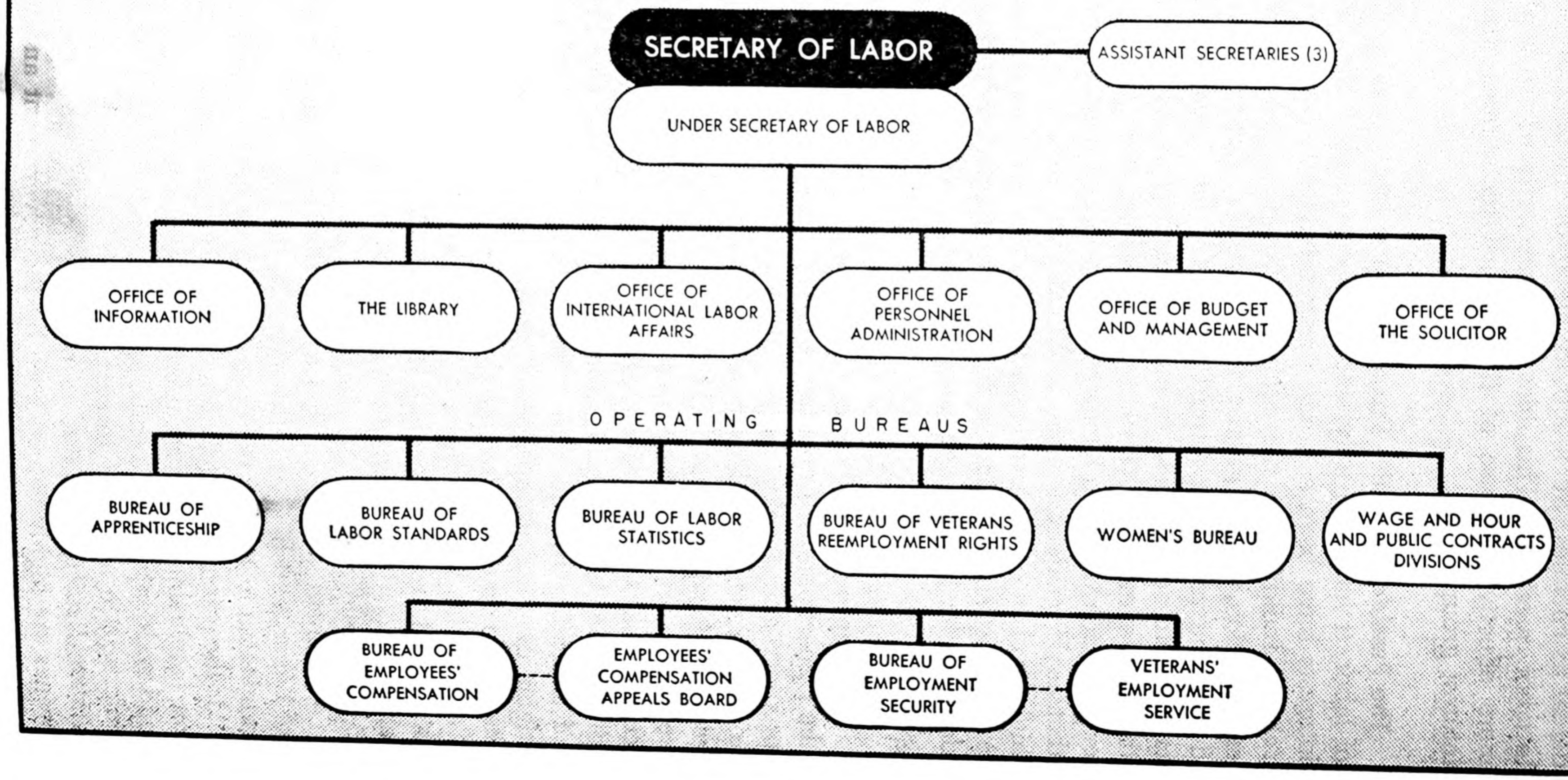
The President. While Presidents have long done lip service to the cause of labor, it has been only since the beginning of the New Deal that labor interests have been a prime presidential preoccupation. President Roosevelt, in building up the economic power of labor and strengthening its organization, added greatly to its political power as well. Any President during the years ahead must take labor into account politically, and must take it into account also in his program for the country as a whole. While the Employment Act of 1946 did not as enacted guarantee full employment or give each worker a legal right to a job, it is now pretty generally realized that any President and any political party must maintain employment at a high level in order to remain in office. Beyond that, the President and his party must show understanding of and sympathy for labor in its legitimate demands for better wages and working conditions and other elements of the good life.

The Department of Labor. The statute providing for the organization of the Department of Labor states that the purpose of the agency is "to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment." The focus of the department, therefore, is on service to an interest group after the fashion of the Departments of Agriculture and Commerce rather than to the public as a whole. This fact has given point to its organization and activities and also has stood in the way of allocating functions to it which require unbiased consideration of the rights of other groups. So it is that from time to time various agencies having to do with labor problems have been set up outside the department. So it is also that agencies originally allotted to it have, on occasion, been separated from it, leaving it by far the smallest and perhaps the least effective of the executive departments. As of March, 1950, it had just over 5,500 employees.

Prominent among the divisions of the Department of Labor is the Bureau of Labor Statistics. It is the oldest of the bureaus in the department, having originated in 1884 as the Bureau of Labor in the Department of the Interior. It is the principal fact-finding and analytic agency of the federal government on employment and manpower developments, wages, industrial relations and accidents, price trends, and costs and standards of living. It makes its information available in part through its official publication, the *Monthly Labor Review*. Its studies of living costs, employment, and hours and wages are highly valued both by the government and by private interests.

A Bureau of Labor Standards operates as a service agency to state labor

DEPARTMENT OF LABOR



departments, state officials, and private groups interested in the improvement of working conditions. Its function is in part to delineate proper standards of employment to be prescribed in various fields. It seeks to bring about enactment of wise legislation on labor and the coordination of federal and state programs.

A combined agency now known as the Wage and Hour and Public Contracts Division administers the provisions of the Fair Labor Standards Act which have to do with the establishment of maximum hours and minimum wages and the prohibition of child labor. It also administers the provisions of the Walsh-Healey Act which regulates hours and wages and restricts child labor and convict labor used in production under contract for the federal government. The Women's Bureau concerns itself with the welfare of wage-earning women. The Bureau of Veteran's Reemployment Rights administers legislation on the employment rights of veterans as created by federal statutes.

The Bureau of Employment Security includes The United States Employment Service and the Unemployment Insurance Service. The employment service has been shifted back and forth between the Department of Labor and the Federal Security Agency, but it is now located in the department.

> Its functions are to promote and develop a national system of public employment offices; to maintain a veterans service to be devoted to securing employment for veterans; to maintain a farm placement service; to maintain a public employment service for the District of Columbia; and to assist in establishing and maintaining systems of public employment offices in the several states, to assist in coordinating such systems throughout the country and in increasing their usefulness by developing and prescribing minimum standards of efficiency, promoting uniformity in administrative and statistical procedure, furnishing information as to opportunities for employment and other information of value in the operation of the system for clearing labor among the several states.[22]

The insurance service cooperates with the states in administering the unemployment insurance aspects of the social security program.

The Conciliation Service. The United States Conciliation Service was one of the important labor agencies to be shifted out of the Department of Labor. It was established as a trouble-shooting organization which sent out conciliators to attempt to harmonize disputes between employers and employees. On the assumption that such an agency, when housed in the Department of Labor, would be suspect to employers, Congress in the Taft-Hartley Act changed its name to Federal Mediation and Conciliation Service and gave it independent status. It is headed by a director with a national labor-management panel consisting of six men representing management and six representing labor. The functions remain primarily the same as when the agency was in the Department of Labor. Whether or not the argument is valid that non-labor interests would not get justice from the Department of Labor is a matter for speculation and dispute. The pro-labor

22. *United States Government Organization Manual*, 1949, p. 393.

point of view of the department was illustrated in 1947 by the title *Protecting 60 Million Workers* which the Secretary of Labor gave to his annual report. In the light of this departmental attitude, it is not surprising that employers sought and labor unions denounced removal of the service from the department.

The National Mediation Board. One of the important labor agencies established outside the Department of Labor is the National Mediation Board. This body consists of three members appointed by the President by and with the advice and consent of the Senate, of whom not more than two may be of the same political party. The purpose of the board is to administer the Railway Labor Act to avoid interruptions of railroad activities through labor disputes. It attempts to mediate differences between employees on the one hand and railroads and express and Pullman companies on the other. In addition, it may hold or supervise elections to determine who are the rightful representatives of labor for bargaining with employers.

The Railroad Retirement Board. The Railroad Retirement Board, another independent agency, likewise consists of three members. They, too, are appointed by the President by and with the advice and consent of the Senate — one upon recommendation by employees, another by carriers, and the third, the chairman, without designated recommendation. The board administers a kind of social security system created especially for railroad workers. This includes the payment of annuities and pensions to aged employees and their survivors and payments in connection with unemployment, maternity, and sickness.

The National Labor Relations Board. The National Labor Relations Board was originally created as an independent agency of three men to enforce labor's right of collective bargaining guaranteed by the Wagner Act. Through its staff, it investigated charges of unfair labor practices as defined by the Wagner Act and issued cease and desist orders against them. If the orders were not obeyed, the board might petition a United States circuit court of appeals for enforcement. It supervised labor elections to determine bargaining units and certified the proper representatives. Through its trial examiners, it conducted hearings in all such matters. Such hearings became, as a rule, the basis for decisions by the board.

The Eightieth Congress, which enacted the Taft-Hartley Act, regarded the Wagner Act as biased toward labor and assumed that the National Labor Relations Board had the same bias. It therefore changed the personnel of the board by adding two members and restricted its jurisdiction by creating the office of General Counsel with control over field work and the activities of trial examiners. Thereby the board became virtually an appeal court with little power of its own except as decisions of trial examiners might be brought before it. The General Counsel, through supervision of officers and employees in regional offices, became the real center

of power. For reasons not altogether clear, President Truman appointed to this office Robert N. Denham, a conservative Republican.[23] Denham so exercised his authority as to change fundamentally the character of the establishment built round the National Labor Relations Board. As authorized by the statute, he took command of the field forces of the establishment and ran them without reference to the desires of the board. He administered the act to curb what he regarded as unfair labor practices on the part of labor and was much less severe with employers than labor thought he ought to be. He brought the injunction back into active use to prevent labor abuses. In most matters he completely overshadowed the board with which he was connected and disagreed with its point of view. The Hoover Commission characterized the situation as anomalous. Failing to get the Taft-Hartley Act repealed, President Truman tried to get rid of Denham by abolishing the office of General Counsel through a reorganization order, but the Senate, under the leadership of Senator Taft, who set out to protect his namesake statute, defeated the move. Denham eventually resigned and the President replaced him with a man in better standing with labor groups, but the defect in machinery could not be entirely corrected by a change in personnel.

CURRENT PROBLEMS IN LABOR RELATIONS

Labor Income. In times of prosperity and rising prices, labor seeks large and frequent wage increases, while employers seek to restrain the upward movement. In times of depression, large scale unemployment, and falling prices, employers tend to reduce wages and workers struggle to maintain them or to curb the speed of the decline. When the end of an upward spiral is anticipated, labor usually attempts to peg wages at a high level. Wages themselves, it is true, constitute only part of the measures of the cost of living. Employers use wage raises as an excuse for raising prices. Although the excuse is often legitimate, it is used just as often to justify price rises which run well beyond the extra cost of paying higher wages. Employers urge that wages must be stabilized to curb the upward sweep of prices. Workers contend with equal firmness that prices must be stabilized to make higher wages unnecessary. That part of the public which is not immediately linked with either group is caught in the squeeze between them.

Although the outcome of the struggle between the two contending groups is determined largely by their relative strength, public attitudes have a measure of influence. It is generally recognized that labor needs higher wages in times of high prices, and it is felt that prosperous employers ought to pay good wages. It is also recognized that in times of stress wages may have to come down if employers are to survive, and that wage cuts may not be unreasonable if consumer prices are low. Some labor leaders take the position that labor and capital have a joint responsibility for production and for the welfare of the workers, and argue that labor should

23. See Bill Davidson, "Labor's Biggest Boss," *Collier's*, November 1, 1947.

have access to the books of employers to measure the just deserts of employees. They argue that since labor stands to gain or lose as management is good or bad, it should share in management strategy. Employers as a rule flatly refuse to permit labor to examine company books and insist that management is exclusively an employer function.

Labor has agreed gingerly to a few experiments at measuring wages by consumer prices, so that they rise when prices go up and fall when prices fall. Such a plan was put into effect in 1948 through a contract between the General Motors Corporation and the United Automobile Workers. A sliding scale was prescribed by which wages would be automatically adjusted upward or downward as the consumers' price index of the Bureau of Labor Statistics rose or fell. In the language of the *Monthly Labor Review*, "it is now possible that a 1-point change in the index can affect the General Motors pay roll at the rate of between $4,000,000 and $5,000,000 a year." [24] Such an arrangement takes into account the general welfare of the workers, but it leaves untouched the employer assumption that his business methods and the prices he charges are matters of no concern to the workers. It implies no sense of responsibility by either group for shaping wage and price levels in terms of the general welfare.

Minimum Wages. Labor unions concern themselves greatly with the general level of wages and, when their bargaining power is supported effectively by government and strengthened by a labor shortage, they succeed in lifting the wage level and pride themselves on their success. In general, however, they are interested in the prosperity of members of well-established unions rather than of all workers unionized or not. After World War II, for example, when union wages went up round after round, the minimum wage fixed by law stayed on a dead level of forty cents an hour. The political power of unions in cooperation with the friends of workers in the government could almost without question have lifted the wage guarantee, but no concerted movement was undertaken. Rather, it was left for the President and the friends of low level workers in the government finally to force an adjustment in the Eighty-first Congress. The experience demonstrates one of the defects of union power — that unions can be as inherently selfish as any other groups of human beings, and have no universal interest even in all those who labor, but only in themselves.

Most of the concern about minimum wages has been voiced in terms of the minimum to be paid for the period actually worked. The minimum now provided under the Fair Labor Standards Act, for example, is 75 cents an hour. The problem of adequate living standards, however, is not merely one of a minimum wage for the period actually worked but of continuous minimum income. A minimum wage which would be adequate with regular work would be anything but adequate if the worker were employed only half the time. In coal mining and in other fields the wage problem is not primarily one of the wage level but of the amount of work provided.

24. *Monthly Labor Review*, vol. 67 (July, 1948), p. ii.

About this problem of minimum income not much has yet been done. Some union demands have been for guaranteed annual wage, however, and the subject has received some thoughtful study.[25] Difficult as the task would seem, the time may come when funds and mechanisms will be provided to insure total annual wages rather than merely wages for the period of actual employment. With such a guarantee, there is no doubt that employers would try to space employment more equally throughout the year and not to hire and fire as the needs of the moment seem to demand. The problem merges with that of unemployment insurance, which will be discussed in the following chapter.

Union Welfare Funds. One of the most important current demands of labor unions is for the establishment of welfare funds, through employer contributions, to supplement the benefits of the government social security system. Employers have resisted contributing to such funds both because of the cost and because they believe that the funds would add greatly to the power of union leaders in their competitive struggle with employers. To curb abuses in the use of funds, the Taft-Hartley Act required that books be properly audited and that employers participate in their supervision. The welfare funds are used for many purposes. For instance, an employee of the United Mine Workers says that

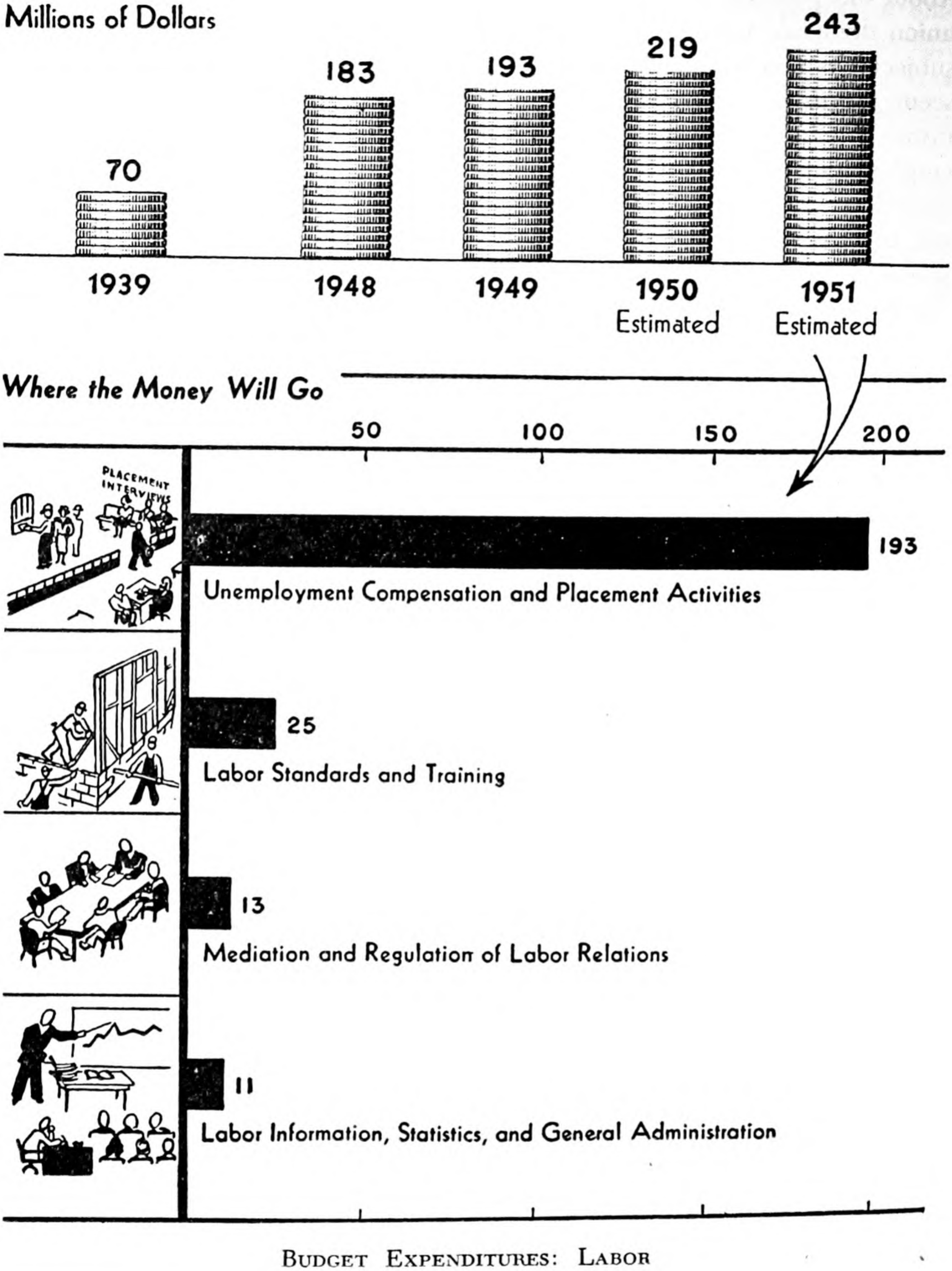
> The UMWA Welfare and Retirement Fund, as one of its most important projects, has provided for the medical treatment, hospitalization, and rehabilitation of paraplegic coal miners — those tragic cases of men who have been paralyzed from the waist down by mining accidents such as roof falls and cave-ins.[26]

Various other health services are provided. The more recent additions have included substantial pensions for aged workers. An agreement between the Ford Motor Company and the United Automobile Workers in September, 1949, set up a pension system at an estimated annual cost of $20 million. It provided that on retirement at the age of sixty-five a worker with thirty years of service should receive benefits of $100 a month, including his federal social security payments.[27] Integrating the company pension system with that of the government gave the employer an incentive to seek increases in the government benefits and met part of the argument that the efforts of unions on their own exclusive behalf withdrew support which was needed for improvement of the federal system. Other automobile companies were required to fall in line, and soon the unions were demanding still larger pensions.

25. See Herman Feldman, "The Annual Wage — Where Are We?", *American Economic Review*, vol. XXXVII (December, 1947), pp. 823–47. This is a review article discussing Murray W. Latimer et al., *Guaranteed Wages: Report to the President* (Government Printing Office, 1947), Joseph L. Snider, *The Guarantee of Work and Wages* (Cambridge: Harvard University Press, 1947), and A. D. H. Kaplan, *The Guarantee of Annual Wages* (New Wilmington, Pa.: Economic and Business Foundation, 1947).

26. Justin McCarthy, "Communication," *Washington Post*, February 4, 1949.

27. *New York Times*, September 30, 1949.



Strikes. Labor's principal weapon is the strike. If workers acting in concert refuse to work, they can stall the wheels of industry and reduce the stream of business to a trickle. The federal government has attempted to preserve for labor the right to strike as a final resort, while providing machinery to settle disputes without strikes and prohibiting gross abuses through them. The guarantee of the right to organize and to bargain collectively is intended to promote the settlement of disputes without

resort to strikes. The prescription of a cooling off period before a strike can be instituted, as has long been done by the Railway Labor Act and as was done for war industries, is intended to avert costly shut-downs. It was estimated that the total cost of the 113-day strike against the General Motors Corporation in 1945–46 was $1,450,000,000, apart from the cost in inconvenience to the public generally. The cost of the somewhat shorter Chrysler strike of 1950 was said to have run still higher.[28]

The Federal Mediation and Conciliation Service makes every effort to bring together the parties in important labor controversies so as to effect settlement without strikes. When this fails, strikes may take place with all their cost to employers, employees, and the general public. In enacting the Taft-Hartley Act, however, Congress recognized that even in time of peace the cost to the public of strikes in key industries was too great to permit warring groups to impose it upon society. The President was given special powers with respect to strikes and lockouts which would imperil the national health or safety. He was to appoint for each such occasion a special board of inquiry. After the board had reported he might ask the Attorney General to seek in a federal court an injunction against the strike or lockout. The Federal Mediation and Conciliation Service would continue its efforts to reach a settlement, and if no settlement was agreed to by negotiators within sixty days the National Labor Relations Board would then take a secret ballot among the workers on their willingness to accept the final offer of the employer. Should all these expedients fail, the injunction would then be dissolved and a full account would be presented to Congress.

Bitterly disliking the Taft-Hartley Act, President Truman has acted under it only when he felt action absolutely necessary. As of January, 1950, he had taken initial steps concerning strike emergencies in only nine instances. They involved strikes affecting atomic energy, meat packing, coal, telephone service, and maritime shipping. Injunctions had been issued in controversies over atomic energy, coal, and maritime shipping.[29] No strike in which an injunction has been issued has gone beyond its sixty day period to the time of dissolution. The difficulty of restraining strikes by court injunction was illustrated early in 1950 when members of the United Mine Workers refused to return to work in obedience to orders from John L. Lewis which were issued pursuant to the court order. There is no effective way of compelling unwilling workers to mine coal.

Whatever the merits of the machinery provided by the Taft-Hartley Act, it is increasingly apparent that unions and employers must not be permitted to fight their private wars at the expense of the public interest. Yet neither of those groups can be permitted to dominate the other. Machinery must be devised for the protection of the public which will at the same time protect the legitimate claims of the contending parties.

Racial Discrimination in Unions. Labor unions as originally organized were private organizations which perhaps rightfully controlled their own

28. *New York Times*, May 5, 1950.
29. *Congressional Record*, January 11, 1950, vol. 96, part 1, p. 291.

membership. They could admit or exclude as they saw fit. They were obligated to act only for the benefit of their own members. The situation has changed, however, as the government has guaranteed the right of collective bargaining with union representatives. Although the Supreme Court has not yet fully stated the point, it seems clear that the union which is so protected becomes to the extent of its protection an instrument of the government. So it is that when the Brotherhood of Locomotive Firemen and Enginemen makes a contract with a railroad company in such a way as to discriminate against the rights of Negro firemen it uses not only its own power but also the power of government. In cases involving this question the Supreme Court has held that the union violated the Railway Labor Act in making such a contract, arguing that as the agent for collective bargaining the union is obligated to act in the interest of all employees, whether or not they are permitted to join the union.[30] In spite of Supreme Court decisions, however, it is hard to prevent discrimination within a union in southern areas where race feelings run high. The government is faced with a serious problem in allocating power to unions while it is unable effectively to control the way in which the unions exercise their powers over the workers for whom they are empowered to bargain collectively.

Communism in Unions. During the late 1940's one of the serious problems in the relations between labor and government was that certain powerful unions were controlled by Communist leaders. The current menace of Communism lies not so much in its Marxist ideology as in the subservience of Communist doctrinaires to dictatorial control from outside the country. The so-called American Communist is subject to foreign instructions on strategy for disintegrating every form of political and economic organization and activity which is inconsistent with control from the Soviet Union. The purposes of Communists in working their way into union leadership are fundamentally destructive, except when the Soviet Union can be aided by efficient production in the United States, as during World War II after Germany had attacked Russia. The Communist leader is concerned with promoting ill will between workers and employers, with fomenting strikes and slow downs, and in general with preventing the normal operation of the American productive system. Results are approximately as bad for workers as for employers, except in terms of the Communists' assumption that the welfare of the worker will eventually be served best by the worldwide extension of the control of the Soviet Union.

Since the Communist membership in most unions is quite small, leadership can be captured only by techniques used skillfully when the non-Communist membership fails to be properly watchful. A typical method was described as follows by the president of the International Ladies Garment Workers Union:

> The Communist technique is simple. The party agent forms the acquaint-

30. See *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944).

ance of a member of a union which is marked for capture. They form a "cell" or "fraction" of a few like-minded members. With the help of the party agent a program is prepared. Naturally, it follows the Communist party line.

At the outset, the party representative's choice falls on a unionist who knows something about parliamentary procedure. Then the stage is set. The innocent is introduced to an important party functionary or well-known party speaker; he is taken to cocktail parties and dances and no time is lost in introducing him to attractive partners.

The next scene is at the union meeting. Hardly is the gathering called to order before the Communist "fraction" starts to work. A member or, better still, a stooge or "innocent" makes a motion. The debate is on. It may and frequently does last long into the night. Slowly the members who want some sleep slip out of the room. As they do, the Communist tide rises. A vote may be taken at 1 or 2 o'clock in the morning. The party-liners win.

Sounds simple, does it not? It is simple. And yet that is the way the followers of Stalin have captured trade unions. The same procedure used at national conventions results in the Communist capture or control of the larger units.[31]

The growing power of Communists in labor unions led to inclusion in the Taft-Hartley Act of a provision requiring union leaders to take a non-Communist oath as a condition of making the services of the National Labor Relations Board available for the unions. In spite of union protests against the regulation, it did much to enable non-Communist members to recover control in important instances. In upholding the oath requirement the Supreme Court said,

> There can be no doubt that Congress may, under its constitutional power to regulate commerce among the several states, attempt to prevent political strikes and other kinds of direct action designed to burden and interrupt the free flow of commerce. We think it is clear, in addition, that the remedy . . . bears reasonable relation to the evil which the statute was designed to reach. Congress could rationally find that the Communist Party is not like other political parties in its utilization of positions of union leadership as means by which to bring about strikes and other obstructions of commerce for purposes of political advantage, and that many persons who believe in overthrow of the government by force and violence are also likely to resort to such tactics when, as officers, they formulate union policy.[32]

In spite of the oath requirement, Communists continued to dominate and to make trouble in a number of unions. In 1949 members of a number of unions got rid of their communist leaders by seceding from the union and forming another union with a different name, leaving their former leaders with the almost empty shell of a union without more than nominal membership. The shell was not completely empty, however, and the new unions had trouble getting immediate control of collective bargaining because

31. David Dubinsky, "A Warning Against Communism in Unions," *New York Times Magazine*, May 11, 1947, p. 7. See also Walter P. Reuther (president of the United Automobile Workers'), "How to Beat the Communists," *Colliers*, February 28, 1948, p. 11.

32. *American Communications Association, C.I.O.* v. *Douds*, 70 S. Ct. 674,680 (1950).

under existing regulations the abandoned unions were the official agents of collective bargaining and were able, indeed, to get injunctions protecting their legal rights.

Much has been said about the world wide unity of labor, or at any rate about the common interests of labor throughout the world. In 1945, when feelings of good will toward the Soviet Union were at their height, the CIO accepted membership in the World Federation of Trade Unions. About four years later, the CIO withdrew, along with the British Trades Union Congress, setting a pattern for other unions from democratic countries. Said the secretary-treasurer of the CIO,

> Thanks to the Reds, the foundation of our structure for the international workingman was built on sand, its timbers were wormy and its roof was full of leaks. Once again we had learned the old lesson that when the communist brethren give you the kiss of "friendship," they also take a bite out of your cheek.[33]

Giving up as hopeless all attempts to work with Communist labor organizations, non-Communist labor organizations late in 1949 established a world organization called the International Confederation of Free Trade Unions. Free from the frustrations of Communist tactics, the new organization grew rapidly, with the vigorous support of both the AFL and the CIO.

Union Leadership. During the first three decades of the twentieth century, the prime requisite of labor leadership was the ability to win and hold members and to persuade or coerce employers into making concessions on hours, wages, and working conditions. The very survival of the unions depended upon periodic successful negotiations. The situation is now greatly changed. The right of collective bargaining, instead of being itself a subject of controversy, is guaranteed by federal statute. So far as union power derives from governmental protection and support, union leaders actually assume a responsibility to the American people as well as to their membership. They vary in the extent to which they recognize this responsibility. Some of them seem totally unaware of its existence. Others show some awareness of the fact that union responsibilities have changed and expanded with the growth of their government-supported power. Certain it is that if leaders are to be permitted to bargain effectively with the management of entire industries and to call strikes under circumstances which involve the well-being of the entire nation, their conduct must be tuned to the national welfare and not merely to their own or that of the unions.

It is to be admitted, however, that if at times union leadership shows little concern for the public welfare, it differs in that respect hardly at all from the leadership of powerful corporations. Corporations derive from government their very right of existence. Their right to operate in interstate or foreign commerce is subject to the exercise of federal regulatory power.

33. James B. Carey, "Why the CIO Bowed Out," *Saturday Evening Post*, June 11, 1949, p. 28.

They receive governmental protection and aid at innumerable points. Yet on many occasions they, like labor unions, conduct themselves as if they had no responsibility other than to themselves, as if the public were their rightful prey and government their mortal enemy. This similarity does not, of course, justify the conduct of either group, but rather shows that neither has grown up to its responsibilities in a modern, highly integrated society which operates in patterns of mass production and mass distribution. The assumption by both unions and corporations of their just obligations to the society of which they form a part is essential to the well-being of that society and perhaps even to its survival. The dangers faced by our economic system lie not primarily in foreign ideologies but in the inadequate fulfillment of obligations by our own economic and social institutions. To make this point is not necessarily to imply that government should assume power wherever unions and corporations fail to demonstrate the proper attitudes and fulfill their obligations. To some extent, government has its own provincialism, its own narrowness, and its own selfishness, corresponding to that of unions and corporations. The social obligations in question are not merely those of institutions but of the people who constitute them and, more particularly, of the people who organize and lead them and give them tone. Success and failure are personal as well as institutional attributes. If defective operation can sometimes be corrected by a shift of emphasis from one institution to another, this possibility is an accident of the particular circumstances and not evidence of the infallibility of one type of institution or organizational mechanism, or of the fundamental weakness of another.

References

Edward Berman, *Labor and the Sherman Act* (Harpers, 1930).

Dean O. Bowman, *Public Control of Labor Relations: A Study of the National Labor Relations Board* (Macmillan, 1942).

John M. Clark, *Guideposts in Time of Change* (Harpers, 1950).

Harold A. Faulkner and Mark Starr, *Labor in America* (Harpers, rev. ed., 1949).

Thomas Russell Fisher, *Industrial Disputes and Federal Legislation* (Columbia University Press, 1940).

Felix Frankfurter and Nathan Greene, *The Labor Injunction* (Macmillan, 1930).

Eli Ginzberg, *The Labor Leader: an Exploratory Study* (Macmillan, 1948).

Charles O. Gregory, *Labor and the Law* (Norton, rev. ed., 1949).

Fred A. Hartley, Jr., *Our New National Labor Policy* (Funk & Wagnalls, 1948).

A. D. H. Kaplan, *The Guarantee of Annual Wages* (Brookings, 1947).

Charles C. Killingsworth, *State Labor Relations Boards* (University of Chicago Press, 1948).

Murray W. Latimer et al., *Guaranteed Wages: Report to the President by the Advisory Board,* Office of War Mobilization and Reconversion (Government Printing Office, 1947).

John Lombardi, *Labor's Voice in the Cabinet: A History of the Department of Labor from its Origin to 1921* (Columbia University Press, 1942).

Harold W. Metz, *Labor Policy of the Federal Government* (Brookings, 1945).

———, and Meyer Jacobstein, *A National Labor Policy* (Brookings, 1947).

Harry A. Millis and Emily Clark Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* (University of Chicago Press, 1950).
Harry A. Millis and Royal E. Montgomery, *Labor's Progress and Some Basic Labor Problems* (McGraw-Hill, 1938).
C. Wright Mills, *The New Men of Power* (Harcourt Brace, 1948).
Wellington Roe, *Juggernaut: American Labor in Action* (Lippincott, 1948).
Sumner H. Slichter, *The Challenge of Industrial Relations* (Cornell University Press, 1947).
Joseph L. Snider, *The Guarantee of Work and Wages* (Division of Research, Graduate School of Business Administration, Harvard University, 1947).
Twentieth Century Fund, *Labor and the Government* (McGraw-Hill, 1935).
Colston E. Warne et al., (eds.) *Labor in Post-War America* (Remsen, 1949).
Fred Witney, *Wartime Experiences of the National Labor Relations Board 1941–1945* (University of Illinois Press, 1949).
Edwin E. Witte, *The Government in Labor Disputes* (McGraw-Hill, 1932).
Donald H. Wollett, *Labor Relations and Federal Law* (University of Washington Press, 1950).

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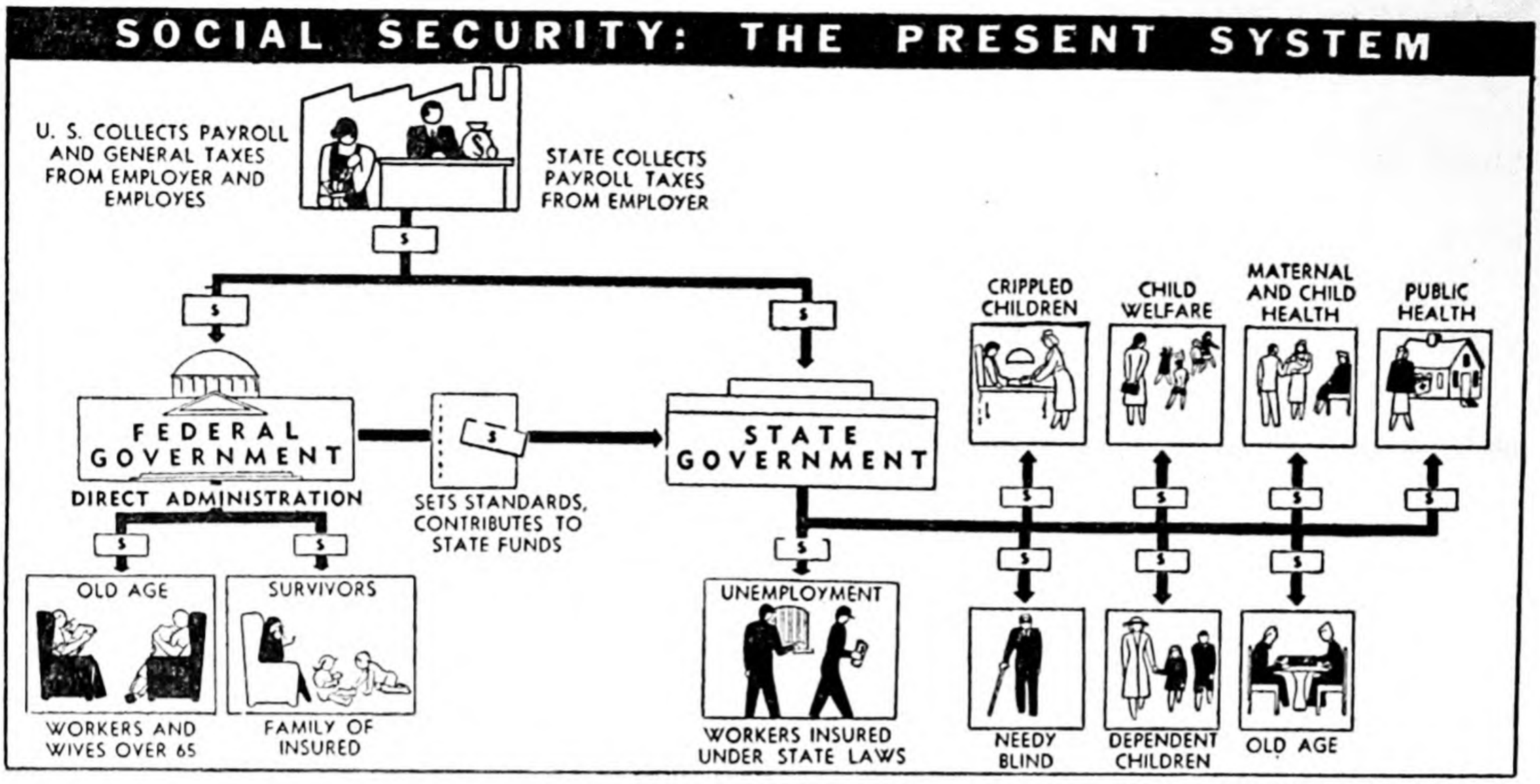
Social Services

Although the Departments of Commerce, Agriculture, and Labor, and various other agencies have already been discussed in terms of the services they render as well as the restrictions they impose or the regulations they enforce, there are particular social services which require further discussion. These include protection against unemployment, provision for old age, health, and housing, and promotion of education and research. The services overlap, and so do the agencies which render them. Some of them do not yet cut absolutely clear as primary functions of government. They are important enough to call for immense government activity and expenditure, however, and they play an important part in the life of the people. In all these fields the government's concern is different from that of the individual who seeks merely to better his own position and of the corporation which aims to increase the public welfare. It aids individuals and groups not in order to discriminate among them or pamper some of them, but to benefit society as a whole. It functions positively as the integrated expression of the body politic with respect to the needs of a unified social order.

SOCIAL SECURITY

The New Deal Emergency. A number of the important services here discussed are commonly grouped together under the heading of "social security," a term which was applied to a betterment program instituted during the New Deal period. Although all important political movements have their roots deep in the past, crises or emergencies of one kind or another are often necessary to bring them to fruition. The development of the federal social security program of 1935 had a long historical background, but it was experience with the depression of the early 1930's which brought about comprehensive action at that time. The traditional attitude in the United States had been that individual distress, if relieved by other people at all, was the problem of relatives or private charity or, at most, of local governments. By and large, it was assumed that economically each individual got pretty much what he deserved and that it was not the obligation of



society to interfere with the sequence of cause and effect. Old people, if unable to maintain themselves, usually lived with younger members of their family or had relatives move in with them.

Individual hardship occurred in many instances, however, and the doubling up of families became increasingly difficult with the growth of urbanization and the relative decline of farming as a way of life. Many counties maintained poorhouses and orphanages to provide the bare necessities for the very old and the very young who had no relatives to support them. Railroads and a few other business organizations began the establishment of pension systems to provide for their employees in old age. Between 1923 and 1929 — the year of the beginning of the great depression — a number of states established old age pension systems which provided a very small measure of relief, but they marked only the bare beginnings.

Depressions or the so-called panics which occurred every few years created a great deal of distress which in the past had been relieved, if at all, largely through private charity. Such charity was distributed individually or was used to operate soup kitchens and other facilities to provide subsistence for the temporarily unemployed. The depression quickly became so severe, however, that public sentiment demanded government participation in relief projects. During its early years many politicians, and particularly the Republican administration then in power in Washington, insisted that the responsibility for relief belonged to state and local governments rather than to the federal government. Many localities and even many states, however, were so hard hit that eventually the federal government was driven to become a gigantic relief agent for individuals and groups throughout the country. Those most reluctant to establish a program of federal relief urged that it be undertaken at the least possible expense and therefore ought to be executed by means of a dole which would provide the needy with the bare necessities of life and would involve no other expense

beyond the minimum needed to handle the program.

The New Deal administration, however, caught up the expanding sentiment of community responsibility not merely for bare subsistence but for the morale and the mental and moral health of the people as well, and insisted that relief be granted so as to preserve the self-respect of the people aided. It created work programs of various kinds through which many of the unemployed would earn the relief money they received. Some of the programs involved construction, reforestation, and projects of other kinds which had great value for the country through the work done as well as the relief granted. Other programs, which were set up speedily because hungry people could not wait for food, involved activities ranging from the moderately useful to the nearly valueless. These latter activities, such as leaf-raking and moving stones from one place to another and then back again, tainted the reputation of the entire program, even though the program as a whole had the desirable effect of saving not merely lives and health but also the self respect of large numbers of economically distressed people who cringed at the thought of accepting outright charity.

The depression experience revealed the need for some permanent system for the relief not only of able bodied people who were temporarily unemployed but also of aged people and dependent children. It became increasingly apparent that society as a whole must take an expanding responsibility for the prevention of such distress. It was apparent that much of the responsibility ought to be taken by the federal government, although there was doubt whether the Supreme Court, then dominated by conservative legal and economic thinking, would find a federal program constitutional.

The Railroad Retirement Program. The new sense of government responsibility for social security first expressed itself in concrete terms in the Railroad Retirement Act of 1934. Railroads, like other forms of business, were in great distress. Shipping had dropped to a small percentage of its pre-depression figure. Thousands of railroad workers had been laid off, including men with long seniority in railroad employment. Although some of the railroads had limited retirement systems, they covered only a small percentage of the workers and at very low figures. Under pressure from railway unions Congress enacted a retirement act establishing a fund in the United States Treasury to provide pensions for workers beyond the age of sixty-five. The fund was to be accumulated through contributions made by employers and employees. It was argued that the act would promote the railroad business by building worker morale through assurance of security in old age. By enforcing retirement at a given age it would make places for younger men. By spreading income it would add to purchasing power and would promote business. Employee benefits were to be measured by the number of years of railroad employment. To prevent the railroads from renouncing their obligations to former employees laid off in the depression, the act stipulated retirement benefits for all former railroad employees whether or not they were employed at the age of retirement, and without

reference to their reason for leaving railroad employment.

A group of 134 railroads, two express companies, and the Pullman Company, unable to prevent enactment of the measure, challenged its constitutionality by bringing suit to prevent its enforcement. They argued that it was unconstitutional because it granted pensions for services rendered prior to its enactment and because it was "arbitrary, unreasonable, capricious, and oppressive." The Supreme Court, dividing six to three, took the same position. Justice Roberts, speaking for the Court, denied that the quality of worker service on the railroads would be improved by having the government give a sense of security of income.

> If "morale" is intended to connote efficiency, loyalty, and continuity of service, the surest way to destroy it in any privately owned business is to substitute legislative largess for private bounty and thus transfer the drive for pensions to the halls of Congress and transmute loyalty to employer into gratitude to the legislature.[1]

Chief Justice Hughes wrote a dissenting opinion in which he deplored not so much the striking down of particular provisions of this statute as the denial to Congress of the power to pass any form of compulsory pension act for railroad employees. He thought such a measure might well contribute to morale and efficiency among railroad workers and might therefore represent a legitimate regulation of interstate commerce.

Even among the railroads, however, sentiment against a compulsory pension system was by no means unanimous, and in 1937 a compromise measure having railroad support was enacted and put into effect without opposition in the courts. That was the year in which the Supreme Court began to shift away from its conservative position and in which the Social Security Act, to be discussed hereafter, was upheld. Instead of bringing them under the general social security statute, Congress continued to handle the security problems of railroad workers independently. Annuities based on years of service are paid to workers retired at sixty-five, to workers sixty years of age or over who have served a minimum of thirty years, and under certain circumstances to workers who have become permanently disabled. Maximum payments run to $144 a month.[2] Benefits are also extended to the survivors of employees who die completely insured.

In 1939, to provide parallel benefits to those given by the Social Security Act, Congress authorized a scheme of unemployment insurance for railroad workers. The act has been extended to provide sickness and maternity benefits. The security statutes for railroad workers are administered by a Railroad Retirement Board of three members appointed by the President with the advice and consent of the Senate. One of them is appointed on recommendation of employees, another on recommendation of the carriers, and the third, who is to be chairman, without designated recommendation.

The General Social Security Program. President Roosevelt and various

1. *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330, 351 (1935).
2. *United States Government Organization Manual*, 1949, pp. 465–66.

members of his administration were interested in the security not only of railroad workers but of workers generally. The President appointed a cabinet committee to work on the problem, and in 1935 Congress enacted the Social Security Act. In its major features the statute provided for insurance against unemployment, insurance to cover old age, and aid to aged persons who had not had an opportunity to participate in an insurance program. Provision was also made then and later for aid to the blind, to dependent and crippled children, and for the expansion of maternity aids.

The social security statute was enacted with an anxious eye upon the Supreme Court, which in the spring of 1935 had held the Railroad Retirement Act unconstitutional. The people and the courts had become in some degree accustomed to the regulation of railroads, even to the extent of dealing with labor problems. They had not become accustomed to federal supervision of labor generally or to federal assumption of responsibility for the welfare of unfortunates. Since the railroad pension statute had been held unconstitutional it was feared that there would be little chance for the broader social security statute unless it could be so drafted that it would be procedurally impossible to get the question of constitutionality before the courts. The question reached the Supreme Court in the spring of 1937, while Congress was considering the President's proposal to renovate the Court by adding to it younger members who would have the vision to interpret the Constitution in the light of modern problems and modern needs. In two cases it upheld the constitutionality of the unemployment insurance program and of the old age assistance program. On the former, Justice Cardozo speaking for the Court said:

> During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than 10 million; at times a peak was attained of 16 million or more. Disaster to the breadwinner meant disaster to dependents. Accordingly the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy. The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. . . . The *parens patriae* has many reasons — fiscal and economic as well as social and moral — for planning to mitigate disasters that bring these burdens in their train.[3]

Justice Cardozo made the same point in passing upon the constitutionality of the old age assistance program. The concept of general welfare, he declared, was not static. Needs that were narrow or parochial a century ago might be interwoven in our day with the well-being of the nation. What was critical or urgent changed with the times.

> The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed

3. *Charles C. Steward Machine Co.* v. *Davis*, 301 U.S. 548, 586–87 (1937).

> to be divided. Unemployment spreads from state to state, the hinterland now settled that in pioneer days gave an avenue of escape. . . . Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation. . . . But the ill is all one or at least not greatly different whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poorhouse as well as from the haunting fear that such a lot awaits them when journey's end is near.[4]

In closing, Justice Cardozo dealt with the contention that under the statute the federal government in effect coerced the states to participate in the unemployment insurance program and thereby weakened the moral fibre of the people:

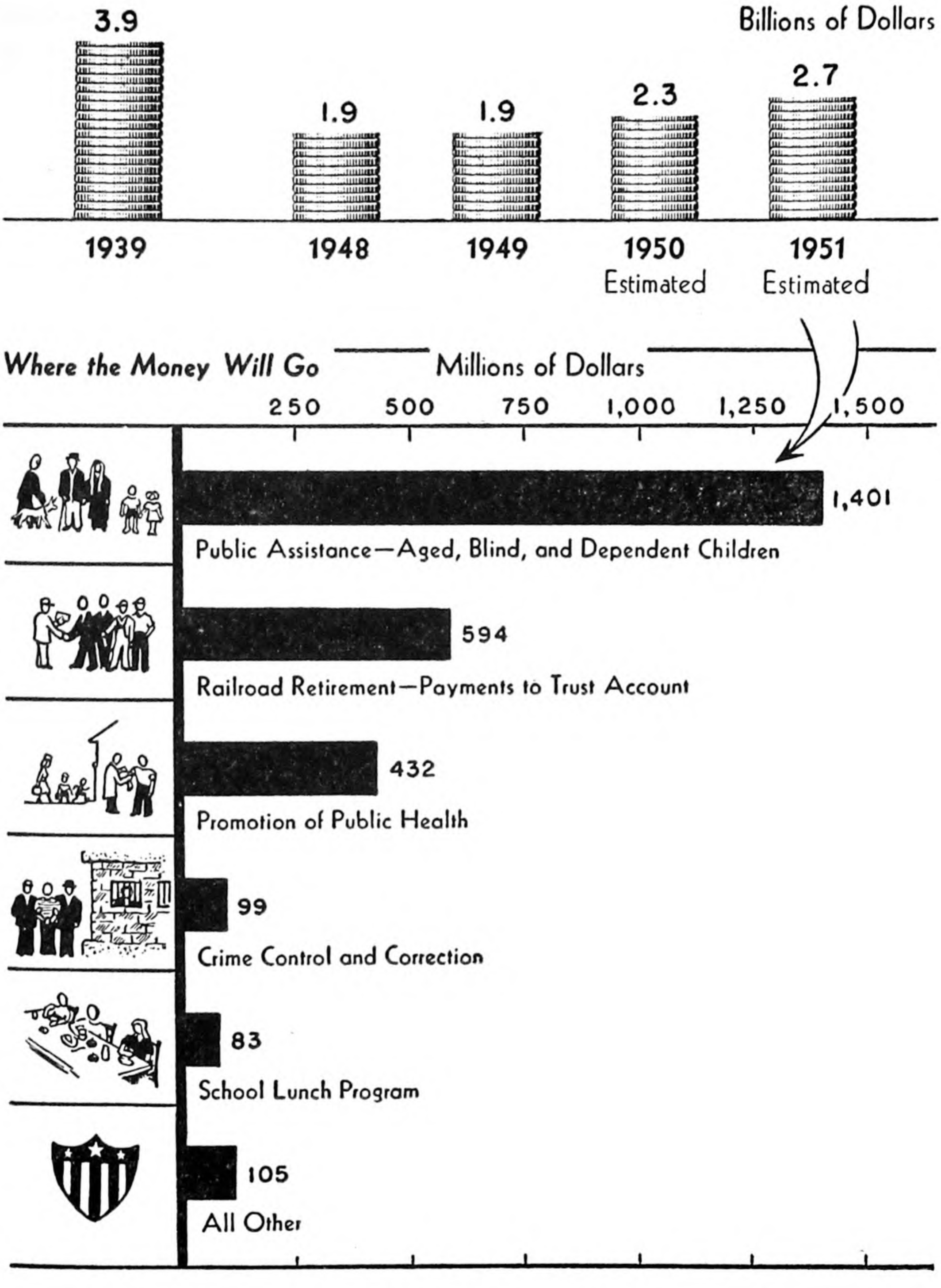
> Counsel for respondent has recalled to us the virtues of self-reliance and frugality. There is a possibility, he says, that aid from a paternal government may sap those sturdy virtues and breed a race of weaklings. If Massachusetts so believes and shapes her laws in that conviction, must her breed of sons be changed, he asks, because some other philosophy of government finds favor in the halls of Congress? But the answer is not doubtful. One might ask with equal reason whether the system of protective tariffs is to be set aside at will in one state or another whenever local policy prefers the rule of *laissez faire*. The issue is a closed one. It was fought out long ago. When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield.[5]

Although the social security program was left with innumerable problems of policy and administration, these two Supreme Court decisions answered finally the major questions of constitutionality. The questions were answered in the light of the new attitude of the American people toward national responsibility for the welfare of all the people.

THE SOCIAL SECURITY PROGRAM

The Problem of Old Age. The depression drove home to the people the tragedy of old age without adequate economic resources. With general unemployment undetermined but somewhere above twelve million, the aged loomed large in the totals. The congressional committees studying the need for a social security program found that in 1937 there were in the United States 7,500,000 men and women over sixty-five years of age,[6] that the percentage of old people in the population was increasing, and that this trend was likely to continue. At that time approximately a million people over sixty-five were dependent upon the public for support, and half that many were dependent upon others for some support. It was estimated that a man who had reached the age of sixty-five could look forward on the

4. *Helvering* v. *Davis*, 301 U.S. 619, 641 (1937).
5. *Ibid.*, p. 644–45.
6. By 1949 the number had increased to 11.3 millions. *Annual Report of the Federal Security Agency*, 1949, p. 50.



average to twelve more years, and a woman of the same age to fifteen. Subsistence was therefore needed for a considerable period. While relatives were carrying a great deal of the load, an increasing percentage of the aged had to receive some support from government in order to survive. In response to the need, thirty-three states and the territories of Alaska and Hawaii had enacted old age pension laws of some kind, but the total

amounts paid were far from adequate. As of 1935 the federal government faced the double task of providing for immediate relief of indigent old people and arranging a program which would in future give the aged some income not as charity but as a matter of right. Congress worked out a scheme which provided for immediate old age assistance and also for a so-called insurance system which would eventually provide pensions to aged persons in prescribed classifications who had become participants in the insurance scheme.

Old Age Assistance. The old age assistance program is a charity program. It is administered by the states under laws approved by the federal government, which provides a high percentage of the funds, though above a certain figure this percentage declines as the amount of each individual payment increases. The federal government pays a higher percentage of the total cost if the state pays small amounts to large numbers of aged people than if it pays large amounts to small numbers. The desire to collect as much money as possible from the federal government is said to encourage some states, or some state politicians, to spread old age assistance as widely as possible among their people. As of June, 1949, out of each thousand of its population over 65, Louisiana had 810 persons on its old age assistance roll. Percentages in some other states ran high, with Oklahoma at 600 per thousand. Some other states, on the other hand, including New Jersey, Delaware, and Maryland, had less than 100 per thousand.[7]

The states also differ greatly in the monthly payments to each individual. The average for all states for January, 1950, was $44.66. Individual state averages varied from $18.98 in Mississippi to $73.82 in Colorado. The total number of persons receiving assistance during that month was 2,749,049, and the total amount paid was $122,786,247. The heaviest outlay was made in California, where 275,085 persons received $19,458,673, with average payments of $70.74.[8] There is no doubt that the expenditures through the old age assistance program relieve a great deal of distress. The distribution is made, however, not as a matter of right but as a matter of charity. It carries no implication that the aged are entitled to what they receive, but rather that they are merely the beneficiaries of social good will. From the point of view of morale, the system leaves much to be desired.

Old Age and Survivors' Insurance. The social security program attempts to provide non-charity income for old age through old age and survivors' insurance, commonly known as OASI. Under this program, benefits are paid to aged persons and their dependent survivors from a fund built up by employer and employee contributions based on earnings in the covered employments up to $3,000 a year. It is an insurance system except that the funds collected are not actually set aside and invested separately by the federal government as in private insurance. The federal government,

7. *Ibid.*, p. 51.

8. *Social Security Bulletin*, April, 1950, p. 30.

which must collect billions of dollars each year for its varied purposes, spends the insurance money currently and relies on its taxing power to guarantee its ability to meet its insurance payments to the aged. This is probably the only way such a gigantic insurance scheme could be operated without dislocating the economy through government hoarding or investment of the premiums it collects.

Old age insurance, as distinguished from old age assistance, is not a program for the relief of the aged through federal appropriations. Rather it is a device for spreading the worker's earnings over his entire life span instead of his working years only, supplemented by a tax contribution from the employer. If it is assumed that the worker's value to the employer is measured by the total cost to the employer, including both the wages and the federal tax, then it may be assumed that the entire amount paid into the social security fund belongs to the worker and is set aside for his use when his earning capacity has declined or ceased because of old age.

The old age insurance program has been improved from time to time since the adoption of the original Social Security Act. One of the first steps was to extend benefits to survivors of deceased workers. In 1946, Congress did this for the survivors of veterans who, but for the war, might have been accumulating credits under the system. It also coordinated with the system the operations of the retirement plan for railroad workers which is maintained under the federal railroad retirement act. In 1950 Congress greatly expanded the coverage of the program, with results yet to be disclosed.

Payments under the old age insurance system began in 1942. The system operates much as was expected except that here, as with old age assistance, the general rise in prices inflated away so much of the purchasing power of the payments that rate increases were imperative if a decent minimum standard of living was to be preserved. As of January 1, 1949, there were 38.3 million living persons fully insured under the program. An additional 5.1 million were currently but not fully insured.[9] The fully insured group was steadily moving into the age group of sixty-five and over. In January of the following year, 2,781,800 persons received $57,034,100 under the program.[10] A gradual shift is taking place from old age assistance to old age pensions. The average payments, however, are far too low to provide adequate subsistence for those who have no other source of income.

Coordination with Private Pension Systems. Some aged people have accumulated savings, some still have a limited earning power, and some are the beneficiaries of private pension systems. It is said that there were more than 9,000 employer-instituted pension systems operating in 1949,[11]

9. *Annual Report of the Federal Security Agency*, 1949, p. 61. By the Social Security Act Amendments of 1950, Public Law 734 of the 81st Congress, coverage was greatly expanded. For analysis of the amendments see *Congressional Record* (temporary daily edition), September 11, 1950, pp. A6788–90.

10. *Social Security Bulletin*, April, 1950, p. 26.

11. Sumner H. Slichter, "The Pressing Problem of Old-Age Security," *New York Times Magazine*, October 16, 1949, p. 9.

Such systems have been encouraged by tax laws and have been used to dispense with workers who have passed the peak of efficiency but lack the reserves to live without continuing employment. Such systems are expensive to operate, however. They yield inadequate returns, their continuation is not adequately assured, and they are operated only by those businesses which are relatively prosperous. The pensions are limited to certain types of employees, and rights under the systems are not transferable when a worker moves from one employer to another.[12]

Many of the same defects characterize pension systems not voluntarily adopted by employers but forced upon them through collective bargaining or strikes by strong labor unions. As was noted in the preceding chapter, some labor groups are winning agreement to pensions of $100 a month or more, including payments under OASI. Because the employer's contribution is thus limited by the amount of the old age pension from the federal government, it is assumed that employers will be inclined to support rather than oppose extension of the federal pension system. Such private pension systems are said to be defective in that they discourage the hiring of older workers, to whom pensions will soon have to be paid, and in that their financial soundness is not yet adequately provided for.[13] Furthermore, reliance upon them means that old age will be properly provided for only where unions are strong. If properly managed they may be good as far as they go in the areas in which they operate, but they are not enough in themselves to fill out the inadequacies of the federal system.

Administration of this branch of the federal security program is lodged in the Federal Security Agency, which has a status somewhat lower than that of an executive department. Within the FSA is the Social Security Administration, and within this, in turn, administration of old age insurance is allocated to the Bureau of Old Age and Survivors Insurance, which has its central office in Baltimore. Some 477 field offices are located throughout the forty-eight states, the District of Columbia, Alaska, and Hawaii. Old age insurance, as distinguished from old age assistance and unemployment insurance, is administered almost exclusively by the federal government.

Unemployment Insurance. For workers in fields in which administration is feasible, the social security program includes also provision for compensation during periods of involuntary unemployment. The unemployment insurance program is operated largely by the states, but the states are virtually coerced into setting up a program satisfactory to the federal government. The federal government exercises the coercion by levying a substantial payroll tax of 3 percent on employment and paying over 90 percent of the amount collected in each state to the state government if it sets up an unemployment compensation plan satisfactory to the federal government. Unemployment insurance programs vary from state to state in the amount paid, the period of payment, the period of unemployment which must elapse before payment begins, and in various other ways. Certain fields of em-

12. See Professor Slichter's discussion, *op. cit.*

13. *Ibid.*, p. 66.

ployment — domestic service, for instance — are excluded because of administrative difficulties, and workers in establishments employing less than eight persons are also excluded.

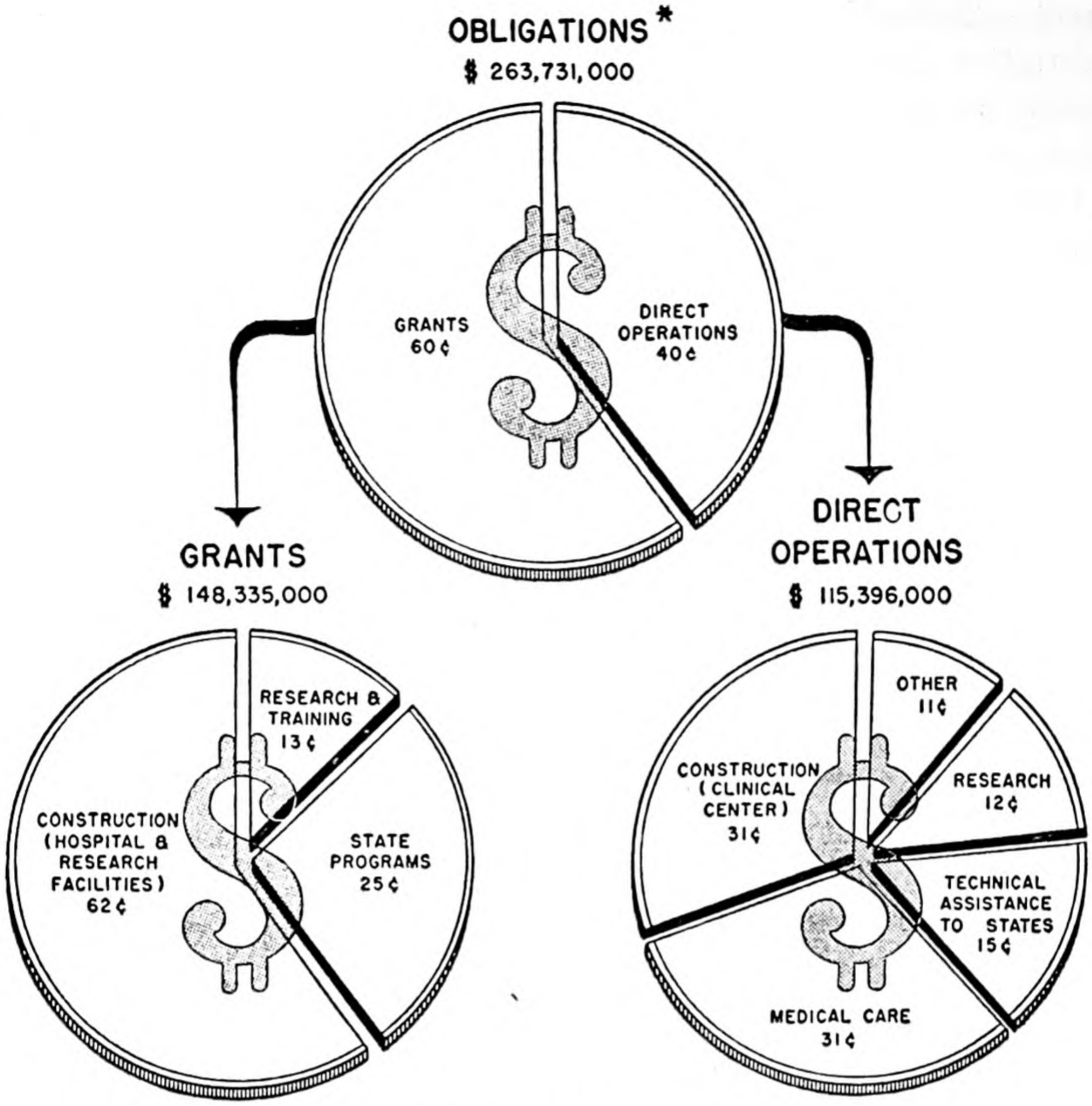
Although the system is in full operation, economic circumstances have not yet permitted a full test of it. It was set up to care not only for incidental unemployment, which is always occurring, but also to protect the large numbers of people who lose employment during depression periods. The years since 1935 have been relatively prosperous, with an even flow of wages. A pronounced downward sweep of the business cycle may prove that unemployment reserves, although thus far accumulating more rapidly than they are being spent, are inadequate to meet long time needs.

The scale of payments is indicated by the figures for January, 1950, when $186,382,972 was paid out in the forty-eight states, the District of Columbia, Alaska, and Hawaii, to an average of 2,077,565 weekly beneficiaries. The average weekly payment was $21.17. The amount is not munificent, but it provides a cushion against dire need during a period of readjustment.

Administration is defective in that collections on illegitimate claims in many of the states still run high. Payments are supposed to be made only to people who cannot find employment. All sorts of techniques are devised for collecting payments while avoiding jobs, or even after beginning work at new jobs. Many people, it is said, assume that they are entitled to unemployment insurance accumulations on the ground that they have contributed to building them up. Actually, unemployment insurance funds, as distinguished from old age insurance funds, are collected exclusively from employers in most states. In only two states are employees also required to make contributions.[14] The reserves accumulated belong to society to protect it against the evils of unemployment rather than to individuals who for a given period have been employed and have the opportunity of continuing in employment if they wish to do so.

Part of the difficulty of administration lies in the fact that although a certain amount of federal supervision is exercised, the unemployment insurance programs are state programs and are administered with all the diversity which characterizes the several state governments. By and large, while there are advantages in administering locally most governmental programs which can be so handled, elimination of graft and inefficiency seems more nearly feasible under federal than under state jurisdiction. Partly because of this diversity of jurisdiction, furthermore, as well as for other reasons, adequate coordination has not been worked out between relief during unemployment on the one hand, and the business of locating jobs and bringing workers to them on the other. The Bureau of Employment Security, now in the Department of Labor, handles most federal responsibilities in the matter. One of its branches, the Unemployment Service, tries to place unemployed workers, and the other branch, the Unemployment Insurance Service, supervises the operation of the insurance system.

14. C. Howard Whitman, "Chiselers' Holiday," *Collier's*, June 26, 1948.



* Includes $232,251,000 direct obligations plus $31,480,000 transfered to FWA for construction of clinical center.

How the Public Service Health Dollar Was Spent in 1949

Other Social Security Programs. On a considerable scale the federal government provides still other kinds of aid, with administration through the states. Considerable sums are distributed to the blind. In January, 1950, a total of 93,109 blind people received $4,300,971, an average of $46.19 per month.[15] This group, although relatively small by comparison with the total of the unemployed and of the aged, is said to be highly effective in presenting its case to Congress. During the same month $44,785,459 was distributed to aid dependent children in 610,443 families, with an average of $73.37 per family.[16] Considerable sums were spent on maternity and child welfare needs apart from these programs. The Children's Bureau, formerly a unit of the Department of Labor but now in the Federal Security Agency, renders a great variety of services to mothers and children. For these and other purposes federal aid is distributed far and wide.

15. *Social Security Bulletin,* April, 1950, p. 31.
16. *Ibid.,* p. 32.

PUBLIC HEALTH

Relation to Social Security. Governmental responsibility for the basic economic problems of social security has now been firmly established. Closely related to the problems of economic security are those of health. Although estimates vary, it is generally recognized that much of the economic distress suffered by the American people is the result of illness or physical inadequacy, and that the loss of production resulting from illness runs into millions of dollars annually. It was only natural, therefore, that President Roosevelt and the members of his administration and of Congress who sponsored the original social security program should be interested in extending it broadly into the field of public health. To that end, they advocated at session after session of Congress a program of insurance which would provide adequate medical care for all. Need for improved medical service was emphasized by disclosures of the Selective Service System. President Truman reported to Congress on November 19, 1945, that as of the first of the preceding April nearly five million male registrants between the ages of eighteen and thirty-seven had been examined and classified as unfit for military service — approximately 30 percent of all those examined! In addition, about a million and a half men had been discharged from the Army and Navy for physical or mental disability after induction. An equal number had had to be treated in the armed forces for diseases or defects which existed before induction. Similarly, over one-third of the young women who applied for admission to the Women's Army Corps were rejected for physical or mental reasons.

Although many of those rejected for military service were capable of carrying on civilian work, the waste involved in dealing with physical and mental defects was tremendous. In view of the obvious need for more adequate medical care at all stages in life, the President and others renewed their efforts for a national program to provide adequate medical care and improve public health generally.

National Health Insurance. The program, which was to be known as the national health act, ran into the difficulties which were met by various other proposals of the later New Deal and of the Fair Deal. The early New Deal period saw tremendous enthusiasm for the exercise of governmental power to correct the ills and irregularities of an awkwardly operating capitalistic society. As depression jitters disappeared, conservative sentiments more and more strongly opposed vast programs of federal spending and the extension of federal regulatory power over activities previously left to private enterprise. So it was that the public health program of the federal government was denounced by the American Medical Association and other medical organizations as an insidious something known as "socialized medicine" and as unjustifiable regimentation both of the medical profession and of its patients. The professionals were joined by more general critics of the expansion of governmental power. Senator Robert A. Taft, for

example, denounced as socialistic a program by which the federal government would by appropriation match state funds raised by taxes on employers and employees in order to insure that all workers and their dependents should have adequate medical care from physicians of their own choosing.[17] The cost of the administration's comprehensive health insurance program was variously estimated at from $11 billion to $15 billion. Senator Taft, aware of some need for better distribution of health services and aware also of popular demand, countered by introducing a bill of his own which would provide for estimated annual appropriations of only some $240 million. His program was limited to providing appropriations to the states for health services to families and individuals having incomes insufficient to pay for medical care, with additional funds for cancer control, a survey of dental care, and a survey of health and medical care resources in the states.

Introduction of the Taft bill added to the confusion instead of clarifying it, and in spite of administration pressure for its own bill, both measures fell by the wayside in the struggle between the two political parties which preceded the general election of 1948. After his reelection, however, President Truman resumed the fight for better medical care. He told Congress that

> We are, and shall be for some time, short of physicians, dentists, nurses, medical technicians and public health workers. We need more hospitals and clinics. Medical personnel and facilities are unevenly located in relation to the need in different parts of the country — and are particularly deficient in rural areas. We need broader, better supported medical research. We need much more attention to preventive health care and more adequate public health services. Most of all, we need more widespread use of the modern way of paying for medical care through prepaid insurance.[18]

The American Medical Association acted as a powerful lobby against compulsory health insurance, denouncing it as socialistic, as a threat to close personal relations between physicians and patients, and as likely to lower the high medical standards developed under the existing system. Meanwhile various privately organized group health organizations began to provide hospitalization and limited medical care to their members for annual fees. Regarding even such private action as dangerous to the existing scheme of medical practice, the American Medical Association attempted to drive out of business a unit organized in the District of Columbia. For its pains the AMA was prosecuted and convicted for conspiracy to restrain trade in violation of the anti-trust acts, in spite of its protests that the practice of medicine was a profession and not a trade and therefore not covered by the statute.[19]

The Blue Cross and other private group hospitalization and health insurance schemes are expanding. It remains to be seen whether they will be

17. See *National Health Program*, Hearings, Senate Committee on Education and Labor on S. 1606, 79th Cong., 2d. sess., pp. 47–52.
18. *New York Times*, April 23, 1949.
19. *American Medical Association* v. *United States*, 317 U.S. 536 (1943).

satisfactory enough to prevent adoption of a broad federal program or whether they will merely educate the people to the value of health insurance and so pave the way for federal action. They are expensive in terms of the amount of service provided, they do not reach the mass of low income people, and they have various other defects as compared with a possible federal program. In comparison with such a program, they are somewhat in the position of private old age pension systems in relation to the federal system. With the increasing cost of hospitalization and medical care, the eventual adoption of some kind of medical insurance seems almost inevitable.

THE PUBLIC HEALTH SERVICE

Although compulsory health insurance is still in the blue print stage, the federal government already has in operation a broad and expanding public health program. Apart from the medical work of the three armed services, each of which has its own surgeon general and its own medical establishment, the medical program of the government is organized in the Public Health Service, which constitutes one wing of the Federal Security Agency. The Public Health Service traces its lineage all the way back to the Marine Hospital Service which was established in the Treasury Department in 1798. It has long supervised the marine hospitals and been responsible for the health aspects of quarantine work. New functions have been added to it from time to time as the relation of medical matters to government became more apparent. Expansion has been rapid since the New Deal period and particularly since 1939, when the service was transferred from the Treasury Department to the newly-established Federal Security Agency. Since 1933 public health statutes have given the Public Health Service jurisdiction over various items as follows:

1935. The Social Security Act, authorizing state health grants and expanded research.
1937. Establishment of the National Cancer Institute, with research grants and fellowships.
1938. Venereal Disease Control Act, with grants to states.
1941. Beginning of appropriations for emergency health and sanitation.
1941. Wartime Nurse Training Act.
1944. Duties expanded with codification of public health statutes in the Public Health Service Act of 1944.
1944. Research grants and fellowships for general medical services.
1944. Tuberculosis control program established.
1946. National Mental Health Act.
1946. Hospital Survey and Construction Act.
1946. Federal Employee Health Act.
1947. Grants to states for cancer control.
1947. Establishment of Clinical and Laboratory Research Center.
1948. Broadened use of grants for cancer control.

1948. National Heart Act.
1948. National Dental Research Act.
1948. Water Pollution Control Act.
1948. United States membership in the World Health Organization.[20]

From this record it is apparent that the Surgeon General, who heads the Public Health Service, has responsibility for enormously complicated and rapidly expanding functions to improve the health of the American people. For the fiscal year 1949 the $263,731,000 allocated to it for expenditure was divided between grants to states and direct operations in a 60 to 40 ratio. Of the amount granted to states, 62 percent was for construction of hospital and research facilities, 13 percent for research and training, and 25 percent for aid to state medical programs. Of the funds spent on direct operations, 31 percent was allocated to construction of a Clinical Center, 31 percent to medical care, 12 percent to research, 15 percent to technical assistance to states, and the remainder to other items.[21]

Supervision of Research. In addition to its direct health services, which include operation of its 24 hospitals, 20 quarantine stations, and innumerable other activities, the Public Health Service renders important long range aid to the public health by research carried on through its National Institutes of Health. These institutes operate with a professional staff of some 675 scientists from various areas of specialization.[22] They operate in the various fields indicated by the measures listed above and in others. They are interested in control of cancer, venereal disease, tuberculosis, heart disease, infectious diseases, and so on. The institutes combine the specialized basic research of the kind carried on in non-governmental laboratories with the subject matter of the social sciences which is needed to relate science to the lives of the people. It is said that

> As a federal agency, the Public Health Service can give to the study of man's health and sickness the continuity that the Department of Agriculture has given to the conquest of hunger and the Department of the Interior to the development of our natural resources.[23]

THE FOOD AND DRUG ADMINISTRATION

Concerned also with public health, but not connected with the Public Health Service except that it too is lodged in the Federal Security Agency, is the Food and Drug Administration. This agency, imported into the Federal Security Agency from the Department of Agriculture, was organized to police the sale of food and drugs in order to protect the people against harmful commodities. It operates much as does the Federal Trade Commission in related spheres. It checks manufactured food, drugs, and cosmetics for dangerous impurities. It checks for false claims about contents. It seizes

20. Summarized from the *Annual Report of the Federal Security Agency,* 1949, pp. 260–61.
21. *Ibid.,* p. 275. 22. *Ibid.,* p. 279. 23. *Ibid.,* p. 280.

illegally marketed commodities and at times institutes prosecutions for violations of law.

> The inspection force is on the firing line of enforcement operations. It has its dramatic moments — midnight vigils and pursuit over icy streets when an attempt is finally made to sneak a lethal abortion drug to the post office; tracing disguised shipments of an unfit food, made despite an injunction ban; making wire recordings of a pitchman's oral misbranding of his wares.[24]

In general, however, the activities are those of prosaic and thorough investigation. In order to cope with sales dangerous to the public, the Food and Drug Administration must often engage in independent scientific investigation, so that its activities develop at least a superficial resemblance to the research activities of the Public Health Service.

HOUSING

Some of the federal government's more important services to people in need have been rendered through aid and protection for home ownership, aid in home constructions, and maintenance of rent ceilings. Before the 1930's, the construction of houses for residential purposes and the provision of credit in connection with construction and ownership were almost exclusively matters of private enterprise. During the depression, however, the decline in residential construction, the loss of homes through mortgage foreclosures, and the need for restimulation at various points resulted in federal intervention. The government made numerous loans on security which was deemed inadequate by private lending institutions. The government's aim was not primarily to do a successful banking business but rather to prevent additions to the social chaos by the further loss of homes sold on foreclosure. In the long run, after a number of years of rising prices and improved business conditions, the government liquidated the mass of its depression lending operations without important economic loss. The venture would no doubt have been justified by other considerations even if the losses had been substantial.

In addition to making its own loans on houses already built, the government helped stabilize the housing situation and stimulate repairs and new construction by insuring private loans. Since payment of the loans was insured, there was no difficulty in tapping the accumulated store of private credit which had gone into hiding because of chaotic business conditions. For the combined purposes of stimulating business, providing employment, and improving living conditions for low income groups, government spent substantial sums clearing some of the worst city slums and replacing them with low-cost housing projects. In the face of local protest, it invaded local jurisdiction to the point of exempting its projects from local taxation. The Supreme Court held that the federal government acted within its power to tax and spend for the public welfare when it engaged in such projects, and that it had the power to grant exemption from local taxation.[25]

24. *Ibid.*, p. 510.

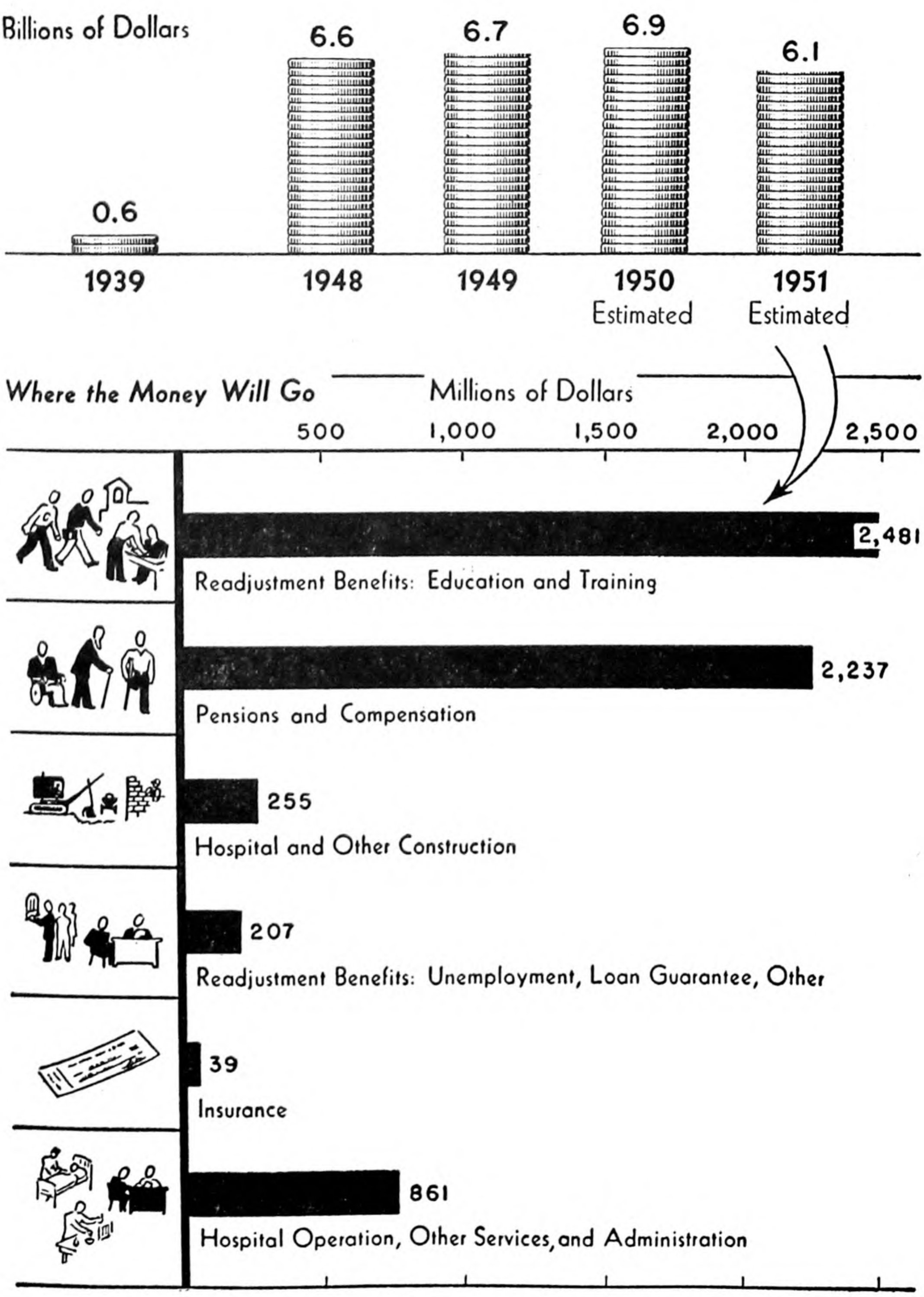
25. *Cleveland* v. *United States*, 323 U.S. 329 (1945).

Post War Developments. At the beginning of World War II we had a host of federal agencies performing diverse housing functions. Although normal housing construction was virtually stopped and rent ceilings were fixed to stabilize the situation, some of these agencies helped with home construction for war projects which required speedy provision for thousands of workers. After the war they helped with the housing of returning veterans. The agencies were consolidated in the Housing and Home Finance Agency, which still maintains some of them as subordinate units to deal with construction of homes, lending, and insurance of loans.

The cessation of normal home construction during the war and the sudden return of millions of veterans to civilian life resulted in a tremendous excess demand for housing. The housing industry, like other post-war industries, was slow in coordinating plans, materials, and labor for wholesale building. Although the federal government continued to regulate the flow of necessary materials and authorized a housing expediter to mobilize materials for home construction, housing nevertheless had to compete with other industries for materials in short supply. There was a shortage of labor, and building trades unions did little to speed operations. Obsolete building codes and entrenched political machines stood in the way of speedy construction of low cost housing.

The late 1940's marked a period of warfare between landlords, realtors, and other vested interests on the one hand and on the other hand certain government groups and those in need of housing at reasonable cost. The former group wished to escape rent controls and profit by the housing crisis. The latter wanted rent controls maintained pending government construction and encouragement of construction on a large scale. The Truman administration developed plans for wholesale construction of low cost housing for low and middle income groups by government, at government expense, or with government financial aid. The real estate lobby, which President Truman denounced publicly on various occasions, in 1948 held Congress down to what was derided as a "teeny-weeny" housing bill, and with the aid of private financing interests it shaded the limited federal housing program in the direction of mere financial aid, with construction and financing primarily in private hands and under local supervision. After the 1948 election Congress went to work on a broad program to stimulate housing construction. Conservative interests were again successful in defeating plans for extensive outright construction by the federal government, aid especially for the housing of middle income groups, and aid to construction by cooperatives. The major form of the aid provided was loans for construction by the Federal Housing Administration, a unit in the Housing and Home Finance Agency. Loans were authorized up to 90 percent of the estimated value of the projects. In addition the Federal National Mortgage Association, known as FNMA or, more popularly, as "Fanny May," was given broadened power to buy second mortgages. Under such arrangements it became possible for builders to construct housing projects almost exclusively with government capital, make generous profits on the construction and

perhaps on the sale thereafter, and escape with little financial risk to themselves. The government, eager to promote construction, incurred such risks of overbuilding as might be involved, and it assumed such responsibility when building costs were high. The government turned over to local housing authorities housing projects which it owned, and continued to provide financial aid. Under pressure from landlord and real estate interests, fed-



BUDGET EXPENDITURES: VETERANS' SERVICES AND BENEFITS

eral rent control was weakened, permitting rents to rise or to adjust themselves to the changed market as new homes were offered for occupancy.

The issues of federal housing are not yet clearly revealed. The depression showed that the federal government might have to protect home ownership to stabilize the economy and on humanitarian grounds. Experience of recent years has shown that private enterprise will not on its own initiative and without government aid construct enough housing for occupancy at prices or rents that can be paid by low income groups. Slum conditions endanger the public health and many other aspects of the public welfare which the federal government is now committed to protecting, so that the financing of housing may become necessary. The post-war housing crisis is in a sense a product of the war itself, and meeting it is perhaps but a continuation of the government's wartime responsibility. The income level to which federal aid should go is a matter of debate. Certain it is that people at all income levels have keenly felt the high cost of construction resulting from competition for materials and labor. It is also a matter of debate whether the government should assume virtually all the financial risks of construction and at the same time leave with private enterprise the opportunity to make whatever profits the market will yield. Since risks and the chance of profit ordinarily go together, it is questionable how far one should be provided if the other is eliminated. Back of this lie questions of the actual character of private enterprise as it operates today and the kind of private enterprise we shall try to preserve for the future.

Restrictive Covenants. Government control of housing, as of labor, has run into difficulties over racial discrimination. It is a well known fact that some racial groups attempt to shield themselves from close residential contact with others. Ordinarily, real estate prices decline whenever Negroes, Chinese, Japanese, Puerto Ricans, and other clearly distinguishable groups begin to move into neighborhoods previously occupied only by white people of the Anglo-Saxon and similar racial stocks. The economic and social problem is peculiarly serious in cities with large Negro populations. The equal protection clause of the Constitution debars states and cities from enforcing laws and ordinances zoning against racial groups. State courts are likewise prevented from enforcing private covenants by which purchasers of real estate agree not to sell to proscribed groups.[26] There is nothing unconstitutional, however, about the inclusion of such a covenant in the sale of property, even though it is not subject to court enforcement, and as a matter of fact a great deal of such "voluntary" zoning does take place. The National Association for the Advancement of Colored People has fought against federal lending for projects which discriminate against Negroes.[27] In response to this pressure the Federal Housing Administration, together with the Veterans Administration which has jurisdiction over special hous-

26. See *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).
27. See *Housing Act of 1949*, Hearings, House Committee on Banking and Currency, 81st Cong., 1st sess., pp. 222ff.

ing aid for veterans, announced that after February 15, 1950, government loans would not be made on projects where restrictive covenants had been "filed of record." [28] The announcement did not mean that the government would insure to Negroes and other minority groups the right to buy or rent homes within projects financed with federal funds. It meant merely that the government would not be an official party to a kind of discrimination in which the Supreme Court has said a state could not indulge. The basic issue remained unsettled, for it was clear that racial discrimination would in fact continue in projects having the benefit of government loans even if the government was not directly a party to the discrimination.

EDUCATION AND BASIC RESEARCH

As noted earlier, education, even more than most other activities, has been regarded traditionally as a local rather than a national responsibility. Here again, however, there has been a limited expansion of federal aid and influence as a slowly evolving federal movement was caught up and greatly expanded during the period of the New Deal. Schools, like other institutions, suffered greatly from the depression. Potential teachers drifted away from the profession as salaries failed to keep pace with those in other fields. Construction of school buildings and other facilities fell behind. The federal government stepped in to speed up construction as part of its recovery program. A school lunch program was instituted to distribute to school children surplus food bought up by the government or aid in the local purchase of food to improve child nutrition.[29] Aid was given in various other forms. Federal grants were made in support of education for various vocations, including agriculture, trades, home economics, and teaching. In these and other fields the pattern has been continued and expanded. During World War II, the federal government provided assistance of various kinds to colleges and universities. Many such institutions, largely deprived of civilian tuition-paying students, gained much of their subsistence by providing special education programs for Army and Navy units sent to them for training. Universities with adequate laboratory equipment and personnel, furthermore, contracted with the government to carry on research projects connected with the war. Although the value of some of the training programs remained a matter of controversy, the scientific work done for the government by some institutions had great value in the conduct of the war.

After the close of the war, federal grants for the education of veterans crowded the colleges, universities, and vocational schools. As never before, young men and some young women received a college education on the basis of ability and diligence without reference to economic status. For three years and to a lesser extent for longer, the veterans' educational program brought new life to educational institutions and, in turn, spread their

28. *New York Times*, December 16, 1949.
29. See *Report of the Secretary of Agriculture*, 1949, pp. 62–63.

work throughout the country and among people in varied walks of life. It was widely believed that the lesson of all this would be so plain that continued expenditure on other bases than military service would be likely. In institutions with adequate laboratory equipment and personnel, the federal government continued to maintain research projects of various kinds. Institutions which were nominally private, therefore, or nominally state-controlled, were drawn more and more into the orbit of the federal government. The provision of research contracts became for the educational institutions involved one of the devices whereby federal aid continued to be received. Since these research projects have come largely from the Department of Defense, their value and the quality of federal influence from this source are yet to be adequately measured.

Advancement of Scientific Knowledge. The experience of World War II demonstrated the great military value of advancement and coordination of scientific knowledge. Much of the coordination of scientific work during the war period took place through an emergency agency known as the Office of Scientific Research and Development. When the war came to an end, however, such centralized direction and coordination as had taken place gave way once more largely to individual work in the laboratories of universities and industrial corporations. Whatever the corresponding need for trained manpower elsewhere, the war demonstrated particularly the need for well trained scientists. To promote scientific training and investigation, Congress in 1950 established a National Science Foundation in the federal government. In signing the bill President Truman announced that

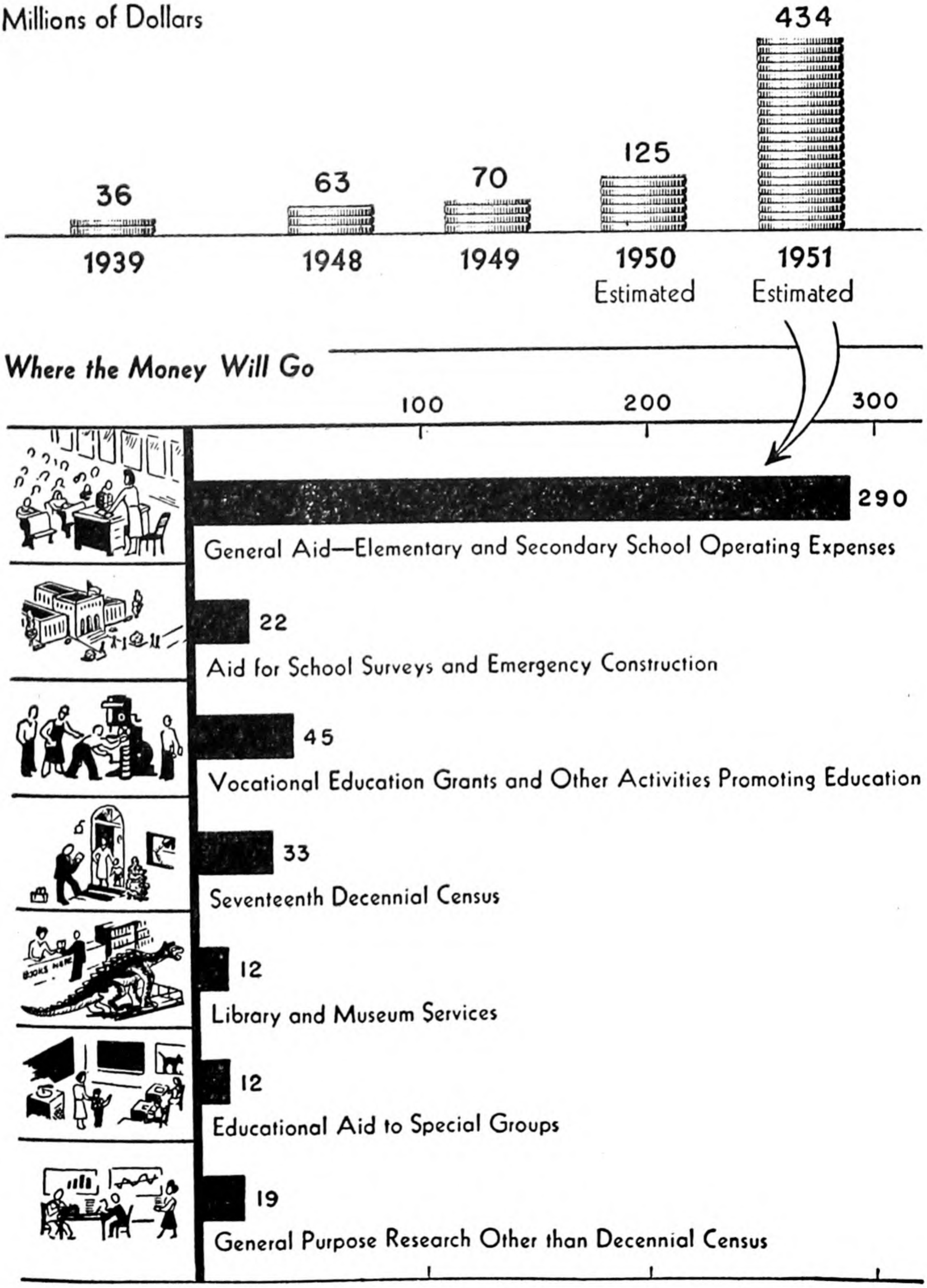
> The foundation will be an independent agency, in the Executive Branch of the Government, headed by a national science board and a director. It will be the function of the foundation to develop a national policy for the promotion of basic research and education in the sciences. The foundation will initiate and support basic research in the physical, biological, engineering, and other sciences. It will also grant scholarships and graduate fellowships in the sciences, and in other ways encourage scientific progress in the country.[30]

Atomic Research. Although in education and research, as in economic security and health matters, the late 1940's found government more and more unwilling to undertake new broad and permanent programs of spending and control, various emergencies required action in the face of this trend. The most important instance was in the field of atomic research. Toward the close of World War II, the United States startled itself into a horrible awareness of mortal danger by dropping atomic bombs on two Japanese cities. The American people were appalled at the destructive power now in human grasp. They were somewhat less clearly aware of comparable possibilities for industrial advancement. Military agencies wished to keep the new source of power fully available for American military use and out of the hands of potential enemies. Industrial groups began

30. *New York Times,* May 11, 1950.

to envisage possibilities of power and wealth from the industrial use of the new source of energy.

Predominant in the thinking of scientists and national leaders, however, was the national safety. There was a widespread feeling that neither the military nor the industrialists of the country could be trusted to develop the use of atomic energy in the national interest and at the same time to pre-



BUDGET EXPENDITURES: EDUCATION AND GENERAL RESEARCH

vent the secret of its use from passing into alien hands. As a result, a government now predominantly conservative in political and economic theory, established by the Atomic Energy Act of 1946 [31] an area of pure socialism within the at least nominally capitalistic economic system of the United States. The statute included within its first section the following statement:

> It is reasonable to anticipate . . . that tapping this new source of energy will cause profound changes in our present way of life. Accordingly, it is hereby declared to be the policy of the people of the United States that, subject at all times to the paramount objective of assuring the common defense and security, the development and utilization of atomic energy shall, so far as practicable, be directed toward improving the public welfare, increasing the standard of living, strengthening free competition in private enterprise, and promoting world peace.

The statute established a five-member Atomic Energy Commission, under the watchful eye of a congressional joint committee on atomic energy but in part also behind a protective wall of secrecy which even the committee could not scale. The commission was to carry out a program for government control of the production, ownership, and use of fissionable material, excluding all private effort from the field except as carried on under the jurisdiction of the commission. The commission was to maintain a federally-conducted program of research and development and to assist and foster private research and development so as to encourage maximum scientific progress. The scientific and technical information accumulated was to be kept under rigid control. Scientists employed in any way in connection with any phase of the project were to be restrained indefinitely from the disclosure of secret information.

Members of Congress supported the measure with the obvious discomfort of people taking cold showers on a frosty morning. It took an important area of development completely out of the hands of private industry where, according to traditional economic theory in the United States, it ought to be exclusively lodged. It brought an important field of scientific investigation under strictly governmental control. It drastically restricted freedom of communication. Yet the pressing demands of national security made necessary these deviations from conventional economic doctrines. As the government pours funds into the network of projects carried on by the Atomic Energy Commission, a vast program is developing behind closed doors which will have a great but unmeasured impact upon the welfare of the American people and of the entire world.

All the services discussed in this chapter — protection against the insecurity of unemployment and old age, provision of health services, provision of housing, and promotion of education and scientific research — are new in the federal government, or at any rate are new in the scale on which they are being provided. There is no reason to believe that they are temporary. On the contrary, they seem likely to be expanded to an indefinite degree. If

31. 60 Stat. 755.

the expansion does not come now, if indeed there is here and there a reversal of trend, the long range trend seems fixed and inevitable. The appearance of inevitability is not merely a matter of protective coloration. It is not merely that politicians have found that they can win more votes by expanding appropriations than by contracting them, however true that may sometimes seem to be. It is rather that the changing character of our economy is making us more and more interdependent. The people of the United States are so interdependent that the nation is and must be vitally concerned about the welfare of the individual. It is a matter for national concern when some of our people are ill fed, ill clothed, ill housed, in poor health, and uneducated. Whether we like it or not, we have become a nation with a highly collective life. We are in many respects a unit as well as an aggregation of individuals. Our collectivism is the price we have had to pay for our economic system, for the fruits of mass production industrialism.

References

Grace Abbott, *From Relief to Social Security* (University of Chicago Press, 1941).

Charles Abrams, *The Future of Housing* (Harpers, 1946).

George W. Bachman and Lewis Meriam, *The Issue of Compulsory Health Insurance* (Brookings, 1948).

Charles A. Beard, *Public Policy and the General Welfare* (Farrar and Rinehart, 1941).

Eveline M. Burns, *The American Social Security System* (Houghton Mifflin, 1949).

Thomas R. Carskadon, *Houses for Tomorrow* (Public Affairs Commission, 1944).

Karl De Schweinitz, *People and Process in Social Security* (American Council on Education, 1948).

Paul H. Douglas, *Social Security in the United States* (McGraw-Hill, rev. ed., 1939).

Abraham Epstein, *Insecurity: A Challenge to America* (Random House, 2d ed., 1938).

Oscar B. Ewing, *The Nation's Health, a Ten Year Program* (Social Security Agency, 1948).

Domenico Gagliardo, *American Social Insurance* (Harpers, 1949).

George H. Gray, *Housing and Citizenship* (Reinhold, 1946).

William Haber and Wilbur Cohen, *Readings in Social Security* (Prentice-Hall, 1948).

Seymour E. Harris, *Economics of Social Security* (McGraw-Hill, 1941).

Lewis Meriam, *Relief and Social Security* (Brookings, 1946).

Lewis Meriam, Karl T. Schlotterbeck and Mildred Maroney, *The Cost and Financing of Social Security* (Brookings, 1950).

James S. Parker, *Social Security Reserves* (American Council on Public Affairs, 1942).

Louis S. Reed, *Health Insurance; the Next Step in Social Security* (Harpers, 1937).

Social Security Board, Bureau of Research and Statistics, *Medical Care Insurance, A Social Insurance Program for Personal Health Services* (Government Printing Office, 1946).

U.S. National Resources Planning Board, *Housing, The Continuing Problem* (Government Printing Office, 1940).

PART SEVEN ★ *Foreign Affairs in Peace and in War*

31

American Foreign Policy

The foreign affairs of the United States are closely intertwined with domestic affairs. This is true whether we speak of commerce, production, labor, travel and communication, or various other problems of major concern to government. In commerce, for example, prosperity at home is vitally affected by that portion of our trade which is foreign, even though most of our commerce is carried on internally. While the great mass of our agricultural and industrial production is consumed at home and satisfies most of our needs, our sales abroad, the competition of foreign goods in our own markets, and the purchase of foreign goods which for various reasons cannot be produced easily or at all in the United States, necessitate vital adjustments in our own scheme of production. Problems of American labor become involved with labor standards of producers in other parts of the world and with ideologies in other countries which influence the conduct of labor. The circumstances of war and the possibilities of war greatly affect our patterns both of production and commerce. The flow of information from other parts of the world, the evidence of ideas and practices flourishing abroad, plays upon the patterns of our own ideas and practices and affects the responsibilities of government, just as the outflow from the United States results in modifications of conduct and belief all over the world. Even the problems of internal police merge with the problems of national defense and war. Illustrations might be multiplied at length.

Yet in spite of the partial identity between foreign and domestic affairs, there are differences so great that government must give separate attention to problems of foreign policy and the conduct of foreign affairs. For the handling of domestic problems, the government of the United States has, or could be given by statute or constitutional amendment, all the powers a government could conceivably possess. In the handling of foreign affairs, on the other hand, the power of our government is limited by the rival jurisdictions and the rival power of other governments. If a mandate directs the Secretary of Agriculture to exercise certain functions at home, we have a right to expect that he will do so if humanly possible. If the Secretary of State is directed to take a certain action in the foreign field, on the other hand, we know that his obedience may depend not only on his

competence or his sense of obligation, but also on what some foreign power does or permits that may affect his assignment. The maintenance of international peace and the conduct of international trade depend not only on the government of the United States but on the governments of foreign powers as well. In the conduct of foreign affairs, therefore, performance is conditioned by diplomacy among sovereign equals and not merely by the actions of our own government. Critical factors affecting our prosperity, and even our survival, may depend on foreign action. In this book we give separate treatment to the conduct of foreign affairs because of these peculiar and sometimes all-important differences.

Even when foreign and domestic affairs are separately discussed, the task remains difficult because of the entanglements one with the others of the various aspects of foreign policy and practice. Discussion of policy tends to involve immediately discussion of mechanisms and devices for its execution. Similarly, discussion of the problems of foreign trade involves treatment of the issues of peace and war. In spite of the interrelations of the various aspects of the subject, however, it is impossible to discuss all of them at the same time and to give each its proper emphasis. They must be separated for purposes of appraisal in spite of the artificiality of treatment which such separation involves. This and succeeding chapters will first discuss American foreign policy as traditionally envisaged and as seen today; will then appraise our governmental instruments, devices, and specialized habits in foreign policy predominantly as involving conditions of peace; and third will consider ideas, methods, and practices employed in planning national defense and in waging war. The primary purpose of this chapter is to discuss policy.

THE NATURE OF INTERNATIONAL RELATIONS

The World Setting. The world's population consists largely of national groups spotted throughout its habitable areas and ruled by governments which, in modern terminology, claim to be sovereign. Sovereignty implies a concentration of power within a country for self-government and a corresponding freedom from the exercise of power by any outside group or agent. Throughout recorded history, peoples have been struggling to preserve internal order and educate their members to accept civilizing restraints. True, whole civilizations have collapsed and disappeared during the roughly 6,000 years of which we have some knowledge. Within particular civilizations, nations have disintegrated or drastically changed their patterns. Even so, we have the impression that, under the jurisdiction of national states with which we are familiar, the process of adapting people to disciplined and effective life within their own groups has been in the long run progressively successful.

Unfortunately, we have no corresponding assurance of progress among nations toward living together in peace and cooperating with each other after the fashion of citizens within national states. Whatever the pre-

vailing theories of international relations, it remains a hard and disturbing fact that relations among nations have not progressed very far beyond the stage of anarchy. Anarchy, while not necessarily implying perennial warfare, does imply that warfare is always easily possible. Codes of ethical behavior and dynamic concept of justice are relevant primarily to conduct within national states, within the political "we-group," rather than to conduct among national states which recognize no superior and unifying authority. To an overwhelming degree, conduct among nations, as distinguished from individual conduct, is governed not by moral or ethical standards or considerations of the welfare of others but by expectations of results to themselves. Nations do follow the pattern of individuals in that many of them desire the territory or resources of others. They yearn for the prestige which comes with successful conquest, for the sense of expansiveness which comes with the enjoyment of new possessions, for the sense of security which comes with evidence of expanding power, and for evidence to support the belief that the impact of future wars will fall not directly upon themselves but upon the enemy, or at least upon buffer states created for their own protection.

Civilizing International Relations. There have been tendencies, it is true, toward civilizing the relations among nations. Experience has demonstrated that among nations as among individuals more of what one wants can often be secured by agreement upon and adherence to codes of behavior than by outright resort to force. Except amid conditions of actual warfare, and sometimes even when war is in progress, nations and their peoples have found it profitable to trade with each other and to make trade possible by adhering to minimum standards of good conduct. For getting what they want, whether it is profitable trade or avoidance of war, nations have learned the mutual value of maintaining official representatives at the capitals and often at other places in the territory of other nations, with mutual guarantees of diplomatic immunity. For centuries, furthermore, juristic writers, judges, and statesmen in other fields have attempted to curb the harshness of international anarchy by proclaiming rudimentary principles of justice for observance even among hostile nations. Arguing from principles of natural law and from customary practice among nations, they have sought to demonstrate the existence of a body of international law, to justify its existence, and to bring about its expansion so that eventually the conduct of nations will be broadly restricted by a code of international law as already the conduct of individuals is restrained by national laws.

Although efforts toward building a body of international law have continued over many centuries, progress has been slow and there have been periods of retrogression. Periodic national flouting of the principles and practices of international law has kept it from accumulating prestige. Individuals within nations obey national law not merely because it reflects the community standard of right conduct but also because punishment is likely

to follow violation. Nations much less than individuals feel themselves bound by codes of conduct, and in any event, they do not face a super-government able to compel obedience or punish violation of international law.

By agreements, nations have attempted to supplement or strengthen principles of international law by outlawing particularly reprehensible conduct such as the killing of prisoners, the slaughter of civilian populations, the use of poison gas, and so on. It is unfortunately true that in times of stress treaties are less effective as a restraint upon evil conduct than is the threat of reprisal. Little or no use was made of poison gas in the European theater of World War II, for example, but few people have any illusion that international law, treaties, or conventions were primary factors in preventing its use.

With the continued growth in the destructiveness of weapons and the changing character of warfare so that whole populations and not merely military forces are directly involved, it is widely contended that war is so destructive even for the victors that a modern war is never genuinely won by either party. It is contended, therefore, that universal self-interest requires establishment of improved machinery for international intercourse, and that through such machinery each nation will enjoy security and possessions which at very least will outweigh the benefits of warfare. To that end, bilateral and multilateral treaties have been made, and organizations such as international courts and arbitration tribunals and the League of Nations and the United Nations have been established. Thus far, however, the horror of modern war has failed to deter all military aggressors, and machinery lacking super-sovereign power has not proved sufficient to maintain a régime of peace. Some of the more powerful nations, it is true, from time to time bedim the sovereignty of smaller ones by interfering with quarrels which, if carried to an extreme, might draw into conflict not only the smaller ones but the larger ones as well. As for the leading world powers, however, there is no authority or scheme of conciliation which can prevent their turning upon one another with horrible destructiveness. Although improved machinery and practices in international relations may do a great deal to prevent increasingly destructive warfare from being virtually continuous, there is as yet no evidence that the more powerful national states, or even most of the smaller ones, are willing to establish and obey a world government for the preservation of world peace and the integration of a world-wide economic order.

The United States in World Perspective. The United States found its place in the far from mutually affectionate family of nations through secession of the thirteen colonies from Great Britain and establishment of an independent government. Its founders, proud of their handiwork, sought to establish it in a strong international position. The framers of the Constitution provided power and machinery to exercise such international functions as were commonly exercised by sovereign governments. They provided for

sending and receiving ambassadors, for making treaties, for maintaining an army and a navy, and for declaring and waging war. Our great need during the last two decades of the eighteenth century was for treaties which would free American trade from widely practiced discrimination. We worked gradually toward a position in which we had the commercial rights conventionally granted to "most favored nations." Since the new nation was protected against potential European aggressors by weeks of precarious travel in sailing vessels, it was deemed expedient to concentrate upon trade alone and to avoid involvement in the political affairs of Europe. So it was that in his farewell address President Washington warned against "the insidious drive of foreign influence" and declared that "the great rule of conduct for acts in regard to foreign nations, is, in extending our commercial relations, to have with them as little *political* connection as possible." [1] It would be unwise, Washington declared, for the American people to implicate themselves in European controversies the causes of which were essentially foreign to our concern. While stating that religion and morality enjoined the observation of good faith and justice toward all nations and the cultivation of peace and harmony with all, he was concerned with expediency as well as broad principles.

> If we remain one people, under an efficient government, the period is not far off when we may defy material injury from external annoyance; when we may take such an attitude as will cause the neutrality we may at any time resolve upon to be scrupulously respected; when belligerent nations, under the impossibility of making acquisitions upon us will not lightly hazard the giving us provocation; when we may choose peace or war, as our interest, guided by justice, shall counsel.[2]

Washington's farewell address was prepared at a time when rival fanatics in the United States were attempting to embroil the fledgling nation in the conflict between Great Britain and France. Here, as in most other important situations during his presidency, Washington was primarily concerned with establishing the new government on a sound footing. He was concerned with avoiding involvement in matters which had no direct relevance to his purpose. His warning against entangling alliances, however, and against involvement in the quarrels of Europe became, not merely for the period of the nation's birth but for a century and more thereafter, a cardinal principle of American foreign policy. Conduct expedient in the early years continued to seem so as the American people opened up and exploited rich new territory adjacent to their homes and carried on profitable trade with foreign countries largely without reference to existing and varying relations among those countries.

We did, it is true, assert a special interest in the affairs of the western hemisphere. America was for Americans. We encouraged revolutions to free American colonies from European powers. In 1823, President Monroe

1. James D. Richardson (ed.), *A Compilation of the Messages and Papers of the Presidents*, vol. I, p. 222.
2. *Ibid.*, p. 222.

announced in a message to Congress what, with subsequent interpretations and extensions, has been commonly known as the Monroe Doctrine. He declared that the American continents were henceforth not to be considered as subject to future colonization by any European powers, and that extension of the political system of those powers to any portion of the western hemisphere would henceforth be regarded as dangerous to our peace and safety. Partly because the Monroe Doctrine pretty much coincided with the interests of Great Britain, which long maintained the most powerful navy in the world and was clearly mistress of the seas, the United States was able to maintain its position as special protector of the western hemisphere in spite of some European irritation and periodic resentment by other American governments at the heavy-handed paternalism of the United States.

Although primarily occupied with internal affairs, the United States, once well established, used all the conventional techniques of international relations to promote its economic welfare. In 1803, in working out relations with France, we purchased the vast area then known as Louisiana. We fought the War of 1812 with Great Britain partly to promote freedom of trade on the seas and partly to protect territorial and trading interests within this country. In 1819 we acquired Florida from Spain. Directly or indirectly, we encouraged the secession of Texas from Mexico and then incorporated it into the United States. We fought a war with Mexico and thereby acquired California and other vast areas. By treaty we established our claim to the Oregon territory so that continental United States extended from the Atlantic to the Pacific and from the Rio Grande to the forty-ninth parallel.

Except for the purchase of Alaska from Russia in 1867, the United States did little to acquire outlying territory prior to the Spanish-American War of 1898. With that war we acquired Puerto Rico, the Philippines, and other island possessions. We annexed Hawaii at approximately the same time. It seemed possible that the United States might be entering on a program of extra-continental expansion on a grand scale. Actually, no such program of territorial imperialism was ever undertaken. Because it had always had available broad frontier areas of land, the United States never developed the land hunger that had become part of the tradition of other countries. It did, however, have a deep traditional hunger for expanding profitable business. Instead of resorting to imperialistic conquest, it emphasized business penetration into Latin America and into the Orient and other parts of the world. At the beginning of the twentieth century, the United States asserted its right of equality with other nations in trading with China in terms of the principle of the "open door." American foreign investments expanded steadily, particularly in the less well-developed countries of the western hemisphere. When unstable Latin-American governments failed to give adequate protection to the property of American citizens, American military forces were used again and again to insure the desired protection. World War I, which exhausted not only the defeated nations but the Euro-

pean victors as well, demonstrated the industrial, financial, and, to some extent, the military potential of the United States. It shifted the investment balance so that the United States became a creditor rather than a debtor nation as it had always been before, and in effect it made the United States the financial center of the world.

In spite of these tremendous changes, dominant American thought about the American position in the world remained virtually unchanged. The slogan of the early 1920's was "back to normalcy." We made extensive loans in Europe partly to promote our own foreign trade, and we intervened from time to time in financial arrangements which affected the welfare of American business. We refused, however, to subscribe to the Covenant of the League of Nations or to join the World Court. We subscribed to multilateral treaties to reduce armaments and preserve international peace, but we assumed few of the obligations of our newly acquired political and economic strength for the guidance of world opinion and the shaping of world institutions to prevent military conflict. Our determination to isolate ourselves from conditions beyond the range of the western hemisphere seemed to deepen with the depression of the early 1930's. To the general economic disillusionment of the period was added disillusionment with the statement of ideals as expressed in World War I, as a congressional investigation disclosed the profiteering of munitions makers and other businessmen in that war. With the approval of the President, Congress enacted neutrality legislation curbing even the traditional freedom of trade so as to exclude American ships and personnel from areas of conflict and thereby prevent American involvement in any future war.

With the outbreak of World War II in 1939, evidence of the ruthless plans of conquest on the part of the Axis countries and their satellites, and their initial military successes, drove our isolationist-minded country steadily toward intervention. In the face of strong resistance, the neutrality laws were modified, a scheme known as Lend-Lease for providing needed supplies to the Allies was worked out, and the United States began to call itself the "arsenal of democracy." Our opposition to Japanese expansion brought on December 7, 1941, the devastating attack upon Pearl Harbor in the Hawaiian Islands and precipitated us into the war. The Axis powers in Europe completed our involvement by declaring war against the United States.

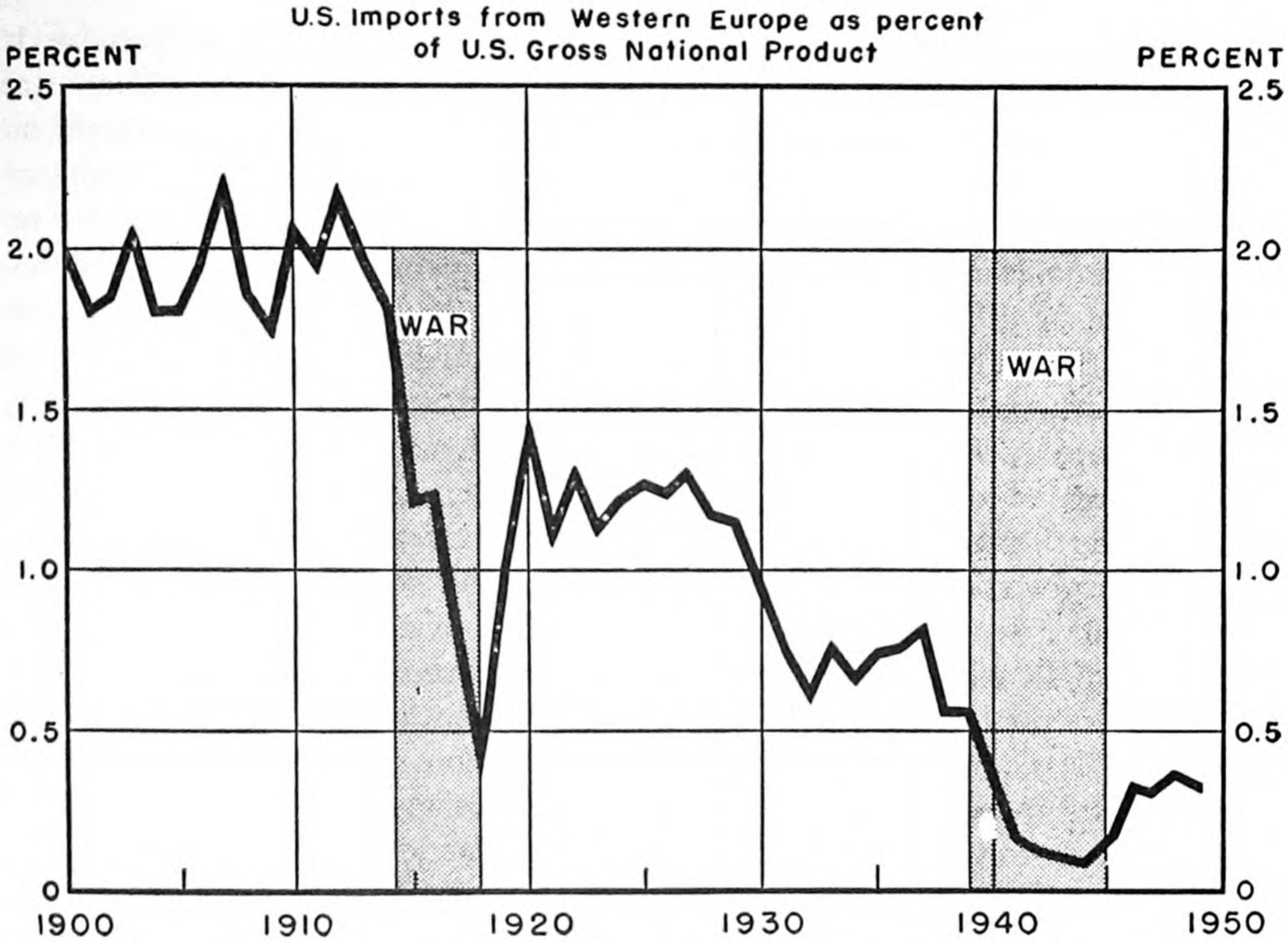
Our foreign policy from 1941 until the defeat of the Axis in 1945 was devoted to winning the war and to solving the problems of the immediate postwar period. Since 1945, it has been devoted to continued efforts to resolve the chaos brought about by the war, to the resumption of normal peacetime business insofar as possible, and to the working out of international relations in the hope of lessening somewhat the dangers of involvement in another and, for us at least, a probably far more destructive world war.

FOREIGN TRADE IN CURRENT FOREIGN POLICY

The Protective Tariff. The protective tariff is the collection of duties on imports to raise their selling price in order to give a competitive advantage to goods manufactured at home. Early tariff measures were justified in part on the ground that, for its own protection, the United States needed to develop its own industries so as to lessen American dependence on foreign producers. In order to enable so-called infant industries to get under way, it was necessary temporarily to give them tariff protection. When manufacturing became well established in the United States, the manufacturing interests grew strong enough politically to insure continued tariff protection. Consumer interests have usually opposed the protective tariff because it denied them the privilege of buying at low rates goods which were produced more cheaply abroad than at home. Various types of interests, however, were badly entangled. A producer in one field was likely to be a consumer in another. Farmers were as a rule strongly opposed to the protective tariff on manufactured goods, but they were enthusiastic about its extension to agricultural products. Workers suffered from prices kept high by the protective tariff, but they benefited from the growth of employment which came with the expansion of American industry. The protective tariff has been an important dividing issue between the two major political parties. The Republican party has always advocated high tariffs on manufactured goods and gradually come to support protection of farm products as well. The Democratic party long advocated free trade, or at most a tariff for revenue only. The tariff system became so completely a part of the American economy, however, and involved so many interests that the Democratic party gradually abandoned its non-protective position and became an advocate of tariff schedules which were merely lower than those advocated by Republicans.

Unbiased people, if there are any such with respect to the protective tariff, have always been divided on the issue. There has been in recent years, however, a growth of sentiment to reduce tariffs, based on the change in status of the United States from a debtor to a creditor nation. As long as the United States was a great field for foreign investment for which the United States paid at high rates of interest, foreigners were able to buy great quantities of raw materials and substantial supplies of manufactured goods from the United States. As more and more our prosperity enabled us to provide our own investment funds, and as foreign investments had to be withdrawn for foreign uses, it became difficult for foreigners to buy our goods. Money, by and large, is only a token of trade. Trade can continue only if there is adequate balance in the exchange of goods and services.

Since governmental policy is the product of conflicting interests, however, and since the interests of highly influential parties may differ substantially from those of the nation as a whole, policy is by no means always the product of rational decision. During the 1920's, for example, while maintaining high tariffs to preserve high prices at home and full employ-



Source: Second Report of the OEEC

WESTERN EUROPE'S SHARE OF THE UNITED STATES MARKET
HAS BEEN DECLINING STEADILY OVER THE PAST FIFTY YEARS

ment in American production, the United States sought foreign purchasers for American goods by making extensive foreign loans. As that experience demonstrated, loans can be safe only when debtors have the opportunity to repay them. Exclusion of foreign products made such payment difficult or impossible. In a sense, therefore, the loans in question constituted a temporary subsidy for foreign purchasers and for American manufacturers at the expense of the American taxpayer. Until the crash of 1929, we maintained an appearance of prosperity, but it proved to be highly artificial. The foreign trade situation was only one aspect of the domestic problem, but it was an important aspect.

Reciprocal Trade Agreements. In 1930, as the country slid down toward the trough of the depression, a Republican Congress attempted to reverse the trend by the Smoot-Hawley Tariff Act, which pushed many tariff schedules to new high levels. Other nations retaliated by raising their tariffs, and the British Empire resorted to a scheme of imperial preferences calculated to benefit the member countries to our disadvantage. This choking of the channels of world trade further deepened the depression. The New Deal administration attempted to reverse this trend by broad reduction of

tariff barriers and attempts to persuade other governments to do likewise. It is usually easy to raise tariff schedules and hard to lower them. There are lobbyists and legislators who have a specific interest in raising the tariff on particular items. They are able to reach agreements with other legislators to give all-round support to high barriers. On the other hand, there are no similarly specific and powerful interests working toward general reduction. In the light of this political difficulty, Congress in 1934 was persuaded, instead of itself attempting to prescribe low tariff schedules, to enact a measure authorizing the President, without additional action by Congress, to enter into reciprocal trade agreements with other countries by which mutual tariff reductions would be made. The program was administered through the State Department. Substantial tariff reductions were agreed upon in negotiations with many countries. The statute was a temporary measure but it was extended from time to time. It ran into its greatest difficulties in 1948 when the question of further extension came before a Republican-dominated Congress which had no emotional commitment to the primarily Democratic program of tariff reduction. It compromised by restricting the measure and extending it for one year, probably expecting, incorrectly as events proved, that Republican leadership in the Eighty-first Congress could work out its own program at leisure. Return of the Democratic party to power both in Congress and in the presidency again brought extension of the program.

In spite of the coolness of the Eightieth Congress and the opposition of powerful interests supporting a high protective tariff, the country became increasingly aware that our new status as a creditor nation, in a world where many former leading traders were impoverished, required tariff reductions to facilitate the flow of foreign trade. At the Geneva Trade Conference held in the summer of 1947, twenty-three countries signed pacts for tariff reductions.[3] The United States, acting under the Reciprocal Trade Agreements Act, was one of the signatories. It was said that the tariff reductions would affect about eighty percent of this country's imports. Only about one-third of its exports would be aided by the reduction, but it benefited further in that other countries had agreed to eliminate import quotas on the amounts of goods to be accepted from the United States.[4] Soviet Russia and the Russian satellites refused to participate.

The International Trade Organization. On the impetus of the Geneva Trade Conference, the United Nations sponsored a meeting which was held in Havana, Cuba, from November, 1947, until March, 1948, to adopt a charter for an International Trade Organization. A draft of the charter had been worked out in Geneva, but extensive negotiation was still needed to harmonize individual national interests. At the Havana conference United States delegates advocated greater freedom of trade throughout the world in the face of arguments from representatives of undeveloped countries

3. *New York Times*, October 31, 1947.
4. *Ibid.*, November 20, 1947.

which sought, as the United States had done a century or more ago, to protect their own infant industries against competition from countries already highly industrialized.[5] Opposition came also from countries in intermediate positions and particularly from Argentina which, while partly overshadowed by what South American critics used to refer to as the "Colossus of the North," wished not only to maintain its own independence but to establish its leadership in Latin America. Its spokesman is said to have portrayed capitalism in the United States as typified by the dollar sign, by the gold at Fort Knox, by international cartels, and by "an international spider web of Shylocks squeezing the heart of hungry multitudes."[6] Such opposition somewhat weakened the position of leadership in the International Trade Organization which the United States sought for itself.

The compromise charter of the International Trade Organization, which was worked out amid the tremendous pressures of conflicting interests, was hailed as marking the end of trade anarchy. For the ratifying countries, it promised broad though by no means complete elimination of barriers to international trade. Some of the barriers, however, such as the use of export subsidies to dump surplus products in other countries insisted upon by the United States, were sanctioned by the charter.[7] The charter was signed at Havana by representatives of fifty-three nations and submitted to their government for ratification. For the most part, the Soviet group did not participate in the conference. Of the fifty-six eligible delegations, only three — Argentina, Poland, and Turkey — failed to sign.[8] Even though Russia took no part, the conference seemed to mark an important forward step in the freeing of international trade. Diverse interests in the United States continued to oppose our participation, however, and as late as October, 1950, the Senate was withholding its approval.

Pan American Trade Problems. The Havana conference was followed in April, 1948, by what was called the Ninth Conference of American States at Bogotá, Colombia. As long ago as 1890, countries of the western hemisphere had established an organization known as the Pan American Union. Binding ties were few, however, and, as stated above, the United States had incurred ill will by free use of its military forces to aid in collecting debts and to influence politics in countries subject to frequent revolutions. The New Deal administration attempted to promote greater cooperation among these countries by inaugurating what it called the "Good Neighbor policy." It showed a more friendly attitude toward Latin America, it provided for the extension of credit, and it used the Reciprocal Trade Agreements Act to promote good will toward the United States. Except from Argentina which, as the most powerful state in Latin America, has always been jealous of the United States, it secured extensive cooperation during World War II. It financed Latin-American production for war purposes

5. *Ibid.*, November 30, 1947.
6. *Ibid.*, December 3, 1947.
7. For a summary of the Charter see *New York Times,* March 25, 1948.
8. *New York Times,* March 26, 1948.

and broadly integrated Latin-American economies into the war program of the United Nations.

With the close of the war, the Latin-American countries were left with their economies temporarily dislocated and with a curtailed demand for their products. Secretary of State Cordell Hull and Under Secretary Sumner Welles, who had been deeply interested in the Good Neighbor policy, were no longer in office. The United States was primarily concerned with critical problems involving the reconstruction of western Europe and restraining the expansion of Soviet Russia, and so gave little thought to Latin America. The Inter-American Defense Treaty, signed in Rio de Janeiro in September, 1947, set up machinery to preserve peace but not to solve economic problems. Latin-American statesmen, faced with local depressions, labor unrest, and the threat of communist infiltration, unhappily looked on as the United States planned to spend billions of American dollars to rehabilitate western Europe without a corresponding expenditure among needy allies in the western hemisphere or adequate use of their products for shipment to Europe.

Against this background, the conference of April, 1948, was held at Bogotá to draft a charter of an organization of American states under the United Nations and to work out a treaty providing for economic cooperation.[9] The conference was driven out of Bogotá by an evidently communist-inspired revolution but returned to complete its work. This experience may well have done a great deal both to intensify the anti-Communist sentiment of the conference and to promote arrangements for inter-American economic cooperation. Nevertheless, plans for United States expenditures in Latin-American countries remained less extensive than those sought by the statesmen of those countries, leaving a measure of discontent.

ORGANIZATION FOR PEACE

A World United. While most activities in pursuance of foreign policy involve important trade considerations, recent events other than those already discussed can be better presented under other headings. Important as background is the fact that involvement of the United States in World War II convinced large numbers of people that since we could no longer stay free of wars started in other sections of the world, we must abandon the pattern of withdrawal from peacetime responsibilities which had characterized our refusal to join the League of Nations and to take permanent responsibility commensurate with our strength. In Congress, Republicans and Democrats alike voiced the widespread belief that American isolation was a thing of the past. The war itself brought a measure of temporary cooperation among what came to be called the United Nations. The several meetings of the leading statesmen of those nations during the war, while devoted primarily to military problems, also brought discussion and planning for post-war relationships. A plan for international loans for post-war

9. For the text of the Charter see *New York Times,* May 3, 1948.

reconstruction was worked out in 1944 at a conference at Bretton Woods, New Hampshire, and sanctioned by Congress the following year. A conference of the leading powers which was held at Dumbarton Oaks in Washington in 1944 worked out plans for a permanent world organization to be known as the United Nations. With some modifications the plan was adopted at an international conference in San Francisco in the spring of 1945. The United States was the first nation to ratify the charter. With only two dissenting votes, the Senate gave speedy approval — in contrast to its action after World War I, when it insisted on so many devitalizing changes in the League of Nations plan that President Wilson abandoned his efforts to get senatorial consent.

The purpose of establishing the United Nations — the mechanisms of which will be discussed in a following chapter — was to bring about international collaboration to solve problems which, if left unsolved, might end in war. Among the problems which might be dealt with were those involving national boundaries, possession of colonies, access to raw materials, access to highways of commerce, regulations of international trade, exchange of cultural information, protection of minority groups, protection of basic rights of all human beings, and many others. Immediately, of course, it was expected that the organization would aid in solving the many problems of governing the defeated Axis countries and in working out treaties of peace. Unfortunately, the effectiveness of the work of the United Nations was from the beginning hampered or completely frustrated by the growing rift between the Soviet Union and the West. More and more the nations of the world were driven into two opposing camps. The United States, by contrast with its self-ordained isolation after World War I, became by virtue of its wealth and power the leader of the nations opposed to the Soviet Union.

The Soviet Union balked at international cooperation except such as could be dictated on its own terms. It sought to expand its jurisdiction westward over the territory of the defeated enemy and over other impoverished European states. It began once more its propaganda for the spread of Communism abroad and the attempts of its agents in other countries to frustrate their political and economic programs. The western powers, on the other hand, while of necessity conceding the right of Russia to dominate a ring of satellite countries along its borders, attempted to prevent further Soviet expansion and infiltration. Through the United Nations it worked for compromise agreements to stabilize the world order and prescribe peacetime independent status for the former enemy nations.

The Truman Doctrine. The sequence of events is well known. Soviet use of the veto power in the Security Council of the United Nations frustrated most plans for cooperation. Four-power control of Germany gradually broke down and the Russian sector was concealed behind the "iron curtain." Propaganda warfare in various European countries and Soviet aid to revolutionary factions caused ever-deeper western concern. Greece, torn

by revolution, and Turkey, in the way of Russia's southward expansion to control the line of east-west ocean commerce, were in positions of growing danger. With Russia ever ready to wield the veto power, restrictive action through the United Nations was obviously impossible. So it was that on March 12, 1947, President Truman appeared before Congress with a proposal marking a drastic change in American foreign policy. He asked for financial, technical, and other forms of aid for the governments of Greece and Turkey. In that speech, he advanced what came to be known as the Truman doctrine:

> One of the primary objectives of the foreign policy of the United States is the creation of conditions in which we and other nations will be able to work out a way of life free from coercion. . . .
>
> We shall not realize our objectives . . . unless we are willing to help free peoples to maintain their free institutions and their national integrity against aggressive movements that seek to impose upon them totalitarian regimes. . . .
>
> I believe that it must be the policy of the United States to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures.
>
> I believe that we must assist free peoples to work out their own destinies in their own way.
>
> I believe that our help should be primarily through economic and financial aid which is essential to economic stability and orderly political processes.[10]

Although Congress voted funds for the aid of Greece and Turkey, the Truman doctrine that the United States was obligated to protect nations throughout the world against totalitarian invasion and against internal revolutions sponsored from without, marked too heavy a commitment to be given blanket approval. In spite of the virtual impossibility of dealing with the current situation through the United Nations, it was also feared that announcement of the Truman doctrine would greatly weaken the United Nations by indicating a policy of independent action on the part of the United States.

The Marshall Plan. It became speedily apparent that aid to Greece and Turkey would involve not merely initial grants by the United Nations but a continual flow of funds over a considerable period. At the same time, many of the other disorganized states of western Europe were asking for loans or grants of one kind or another. Although their needs were desperate, the United States was in no position to welcome them as individual beggars on its doorstep. In 1946, Congress, after extensive debate, had voted for Great Britain a huge rehabilitation loan of $3,750,000,000. That money was fast being spent, much of it for consumer's goods, without evidence that the country would be well enough established within a reasonable time to repay the loan. There was no reason for believing that the continental European governments would be able to do any better. Yet continued economic disorder in western Europe threatened to spread communism and extend Russia's influence, and the iron curtain, westward

10. *Congressional Record*, March 12, 1947, vol. 93, part 2, p. 1981.

to the Atlantic and southward to the Mediterranean. Unwilling to see this happen, the United States had to give aid of some kind.

It was against this background that the so-called Marshall Plan was worked out as a partial substitute for the Truman doctrine. The plan first came to public attention on June 5, 1947, when Secretary of State Marshall, in an address delivered at Harvard University, intimated that if European nations were to receive substantial financial aid from the United States they must plan cooperatively for the use of American aid in such a way as to bring about recovery. While he carefully avoided the appearance of urging European nations to combine to resist the influence of Russia and, indeed, invited Russian participation in promoting European recovery, the world saw the development of the plan as strategy to reconstitute western Europe as a means of resisting the spread of communism.

A bloc of western European nations responded by holding a conference in Paris to assess their economic resources and needs and to plan cooperation toward recovery. At the same time, President Truman designated agencies to survey the economic resources of the United States and to appraise the probable effect of huge expenditures for European relief on the American economy. These agencies worked throughout the summer and autumn of 1947. During the same summer, many members of both houses of Congress officially or unofficially visited Europe to glean independent evidence on which to base their action when legislation and appropriations were called for. In December, 1947, Congress authorized appropriations of something more than half a billion dollars for emergency aid. The President then submitted to Congress what had come to be known as the Marshall Plan, which called for some $17 billion for the period between April 1, 1948, and June 30, 1952. This fund, the President emphasized, was to be spent not merely for European relief but for permanent recovery.[11] Sixteen western European nations, he pointed out, had agreed upon a recovery program designed to enable them and western Germany to become economically self-supporting within four years and thereafter to maintain a reasonable minimum standard of living for their people without special help from others. He remarked that:

> When the representatives of sixteen sovereign nations, with diverse peoples, theories, and institutions jointly determine to achieve closer economic ties among themselves and to break away from the self-defeating actions of narrow nationalism, the obstacles in the way of recovery appear less formidable.[12]

He noted somewhat ominously, however — and perhaps with an eye to winning support from anti-communist legislators — that

> We must not be blind to the fact that the Communists have announced determined opposition to any effort to help Europe get back on its feet.[13]

11. For the President's message, see *Congressional Record,* December 19, 1947, vol. 93, part 9, pp. 11749–54.
12. *Ibid.*, p. 11750.
13. *Ibid.*, p. 11750.

After long debates, Congress in April, 1948, enacted and sent to the President a modified Marshall Plan bill establishing an Economic Cooperation Administration to carry out a European recovery program. Instead of committing itself to a four year program for expending $17 billion, Congress merely authorized approximately five and a third billion dollars for the first of the four years, with other authorizations expected to be made annually. Enactment of the measure was secured in the face of a revival of traditional isolationism in some segments of Congress. To make the funds available, the bill authorizing the appropriation had to be followed by an additional measure in the form of an appropriation act. This measure had to start with the Committee on Appropriations of the House of Representatives, which was headed by an isolationist who was opposed to the theory of the achievement of prosperity by generous spending. The committee reported a bill for a drastically reduced appropriation. The House of Representatives followed the lead of the committee. Tremendous pressure from the Senate and other sources was required before the appropriation was enlarged to a figure approximating the initial authorization. The House saved face by insisting on a compromise by which the expenditure initially allocated for the first year was stretched over fifteen months, with power in the hands of the President to make the expenditure in the one year if necessary. The experience demonstrated how unsettled even yet was our own determination to continue as a consistent and constructive participant in international affairs.

Policy Implications of European Aid. The 1948 appropriations for European aid under the Marshall Plan were followed by similar appropriations in 1949 and 1950, with the end of the planned four year period in sight. The implications of European aid for the future of American foreign policy remained largely shrouded in the confusion of conflicting opinions and interpretations of fact. The program involved vast shipments of American goods. The initial drain on our resources was so great as to continue the threat of inflation which had hung over the country since the close of the war. Thereafter, Marshall Plan purchases provided a market for some of our excess agricultural products and for our growing industrial production not all of which was needed at home. It provided us with a foreign market which without it would not have existed, since needy European countries had nothing with which to buy. Amid the clamor of denunciation of what Herbert Hoover derisively called the "New Generosity," the voices of those with a stake in continuing European aid could also be heard. While some feared that aid at the American taxpayer's expense would be continued beyond 1952, others were fearful that the aid would not be continued and that profitable foreign trade would be cut off.

The original purpose of European aid was to put western European countries back on their feet economically in order to check the spread of communism and perhaps restore them as markets for American goods. The tide of communism was restrained. Shipments of food combined with other

forms of persuasion warded off a communist victory over the newly established Italian government. France, though crippled by communist-inspired strikes, managed to avert communist control and to reorder its economy. Industrial production in the major countries involved has risen steadily.[14] Yet only by virtue of the continuing flow of American funds can the war-stricken countries keep going. Part of the difficulty has been international jealousy, distrust, and refusal to cooperate among the aided countries themselves. Looking first to the survival of their own nationalism, they have maintained tariff barriers and currency blocs and tried to develop a maximum of individual self-sufficiency. Such nationalism is said to bring about the uneconomic expenditure of aid funds. More than seventeen million dollars, for example, was spent to aid the steel industry in Austria. For the economic good of Europe as a whole, it might have been better to spend that money along with other funds in the manufacturing area of the Ruhr. To withhold funds from Austria, however, would have been to strike a blow at Austrian nationalism and invite Communists to make trouble.[15] American pressure did bring about far more than the usual cooperation among the sixteen Marshall Plan countries. One of the more extreme plans for cooperation under discussion as this book went to press was for the joint management of steel and coal industries of France and western Germany. Such a union might allay much of the rivalry which in the past has caused major wars between these two countries, and it might add greatly to efficient industrial production and marketing. It carried the threat, however, of international control of a giant industry by business cartels, with all the dangers such control might bring.

American business sentiments are divided. Our business wants European markets without European competition. It wants to be able to sell to Europe without having to pay taxes to raise money for Europe to buy with. Many people are concerned about future prospects as they look not merely at the recent record but at the trend over a number of decades. Europe's share in the American market has been declining since the beginning of World War I.[16] It has been noted that

> the United States over the last thirty-three years had given or loaned some $80 billions to other countries to help them buy what they wanted and had not the dollars to afford — and that, in addition, another $20 billions in gold was "spent" in the United States.[17]

A study made by the Legislative Reference Service of the Library of Congress showed that between July 1, 1940, and June 30, 1949, the United States had extended to other countries assistance to the amount of $75,430,-

14. See *Seventh Report to Congress of the Economic Cooperation Administration,* Quarter ending December 31, 1949, p. 18.
15. See *An Analysis of the ECA Program,* Senate Doc. No. 142, 81st Cong., 2d. sess., p. 5.
16. See *Seventh Report to Congress of the Economic Cooperation Administration, op. cit.,* p. 4.
17. J. K. Galbraith, *New York Times Book Review,* November 7, 1948, p. 1, reviewing Seymour E. Harris, *The European Recovery Program* (Cambridge: Harvard University Press, 1948).

468,280. While a substantial part of that amount had been provided during the war for war purposes, $26,725,786,619 had been provided during the four years beginning July 1, 1945.[18] Such lavish expenditure did not seem to promise prosperity for sound, taxpaying business in the United States. Thoughtful businessmen have watched the total situation with continuing uneasiness, realizing that it is extremely complicated. They would like to sell in the European market but they can do so only if Europe can buy. Europeans can buy only if their purchases are subsidized from the United States or if they are able to get on their feet economically. Even if they reestablish themselves, they can buy from us only if they are able to sell to us. Their sales to us will compete in our home market with American products, and thereby to some extent depress some kinds of American business. We must take the bitter with the sweet, but we do not particularly like the taste of the mixture.

American Aid in the Orient. In the late 1940's, as we were extending aid to western Europe to forestall the advance of communism, we were being compelled to retreat in Asia. It seems clear that for many years China, the most populous country in the world, has been disintegrating internally and reformulating its social and economic order. The Japanese war against China speeded at least the disintegration. Although during World War II the United Nations attempted to treat China as a major power, it became increasingly apparent that the Nationalist government, for a variety of reasons, could not long remain at the helm. We continued for a time to give aid to that government, including extensive military supplies left over from the war with Japan, but the disintegrating government was unable to make effective use of them or even to keep them out of the hands of an increasingly powerful communist organization. General George C. Marshall and other observers whom we sent to China reached the conclusion that the situation had become hopeless, and when the Nationalist government was driven off the continent to take refuge on the island of Formosa, it was clear that their judgment had been correct.

The result was that such organized government as was left in China was communist, operating under the leadership and advice of Soviet Russia. While we were winning in western Europe, therefore, we had the dismal experience of seeing a vast Asiatic area drop behind the iron curtain. We discussed every kind of policy, from military restoration of the Nationalists to abandonment of the entire continent to communist domination. By middle 1950 we had virtually given up all thought of defeating communism in China, but we were planning through various kinds of aid to prevent the spread of communism to Indo-China and Indonesia in the Southeast. Our program there is still in process of development. Here, as in Europe, we are working to "contain" communism. We are adjusting the Truman doctrine to the conditions of that part of the Orient which has not fallen under communist domination. Our program in Korea prior to the outbreak of

18. *Congressional Record* (temporary daily edition), May 4, 1950, p. 6419.

war in 1950 could be classified under the same heading, although Korea's situation as a formerly Japanese-dominated country was somewhat different.

The "Point Four" Program. In his inaugural address delivered on January 20, 1949, President Truman announced that during the coming years our program for peace and freedom would emphasize "four major courses of action." First, we would continue to support the United Nations. Second, we would continue our programs for economic recovery. Third, we would strengthen freedom-loving nations against the dangers of aggression. Fourth,

> we must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of under-developed areas.[19]

This was the initial statement of the Point Four program. The gist of the argument was that, as distinguished from giving financial aid and aid in the form of goods to other countries, we should help them to make better use of their own resources by making available to them our store of technical knowledge, of American "know-how." Whereas the material resources which we could afford to use for assisting other peoples were limited, said the President, "our imponderable resources in technical knowledge are constantly growing and are inexhaustible." He urged that "Our aim should be to help the free peoples of the world, through their own efforts, to produce more food, more clothing, more materials for housing, and more mechanical power to lighten their burdens."

The Point Four program was much less new than the President's statement implied. During World War II we had had a great deal of experience in teaching American industrial "know-how" to our allies. In administering the Marshall Plan program, or ECA as it came to be called, we were making a great effort to implant the technical knowledge needed to restore prosperity in the Marshall Plan countries. The program was new, however, in that the United States had never before announced its intention of improving world welfare by distributing American technical knowledge to underdeveloped countries wherever they might be. It was the announcement of a new attitude rather than a new practice. As such it was received with suspicion by rivals of the administration. They saw it as still another cover for American giving, another label to be paraded alongside the New Deal and the Fair Deal. In May, 1950, Congress was with the greatest difficulty persuaded to authorize expenditure of a mere $35 million for a Point Four program. It remains to be seen whether the aims of that program can be better realized as a result of the announcement of the program than they would have been had technical aid been provided for incidentally and without such highlighting.

19. *Congressional Record,* January 20, 1949, vol. 96, part 1, p. 474.

MILITARY ALLIANCES

For a century and a half after George Washington warned the new nation against entangling alliances, the United States heeded the warning as if it had been issued as a principle applicable to all times and circumstances rather than to the period of our national infancy. The provision of the League of Nations which most deeply horrified American isolationists was the language of Article 10, which read as follows:

> The members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. In case of any such aggression or in case of any threat of danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

Even with reservations eliminating the applicability of Article 10 to the United States in any way, the Senate refused consent to membership in the League lest the independence of the United States be in some way impaired and its peace endangered. The drift of dominant public sentiment between the two World Wars seems to have been in harmony with this attitude.

World War II marked a broad reversal of attitude. The Senate overwhelmingly approved the charter of the United Nations, which provided in Article 42 that the Security Council

> may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43 provided that

> all Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage necessary for the purpose of maintaining international peace and security.

To implement these provisions, Congress authorized the President to negotiate with the Security Council, and to present to Congress for its approval, agreements by which the President could thereafter, without further authorization from Congress, make United States armed forces available to the Security Council. This arrangement was intended to enable our government to act quickly as a member of the United Nations without calling Congress into session or waiting for it to deliberate upon matters of United Nations policy. The United Nations has been hampered in developing its plans to prevent local disorders throughout the world, not by unwillingness of the United States to play its part in the United Nations but by the division of the world into two rival camps in such a way that no single organization could adequately implement the policies of both.

The Inter-American Defense Agreement. In order to secure acceptance

of the charter of the United Nations by many national governments, it was necessary to recognize in the charter the right to establish regional associations for mutual defense. In harmony with these provisions, an inter-American conference was held at Rio de Janeiro, Brazil, in the summer of 1947 to agree upon a treaty of reciprocal assistance. The treaty adopted included the following section:

> The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.[20]

The United States looked upon this inter-American agreement in the light both of the earlier threat of German aggression in the western hemisphere and the growing rift between the Soviet Union and the western powers and communist attempts to bring about the overthrow of governments and cause chaos which could be turned to communist advantage. The Senate approved the treaty almost without debate and with only one dissenting vote.[21]

The Atlantic Pact. We have long been accustomed to the idea of inter-American defense, but international defensive compacts including non-American nations are new to our thinking. Until recently we thought we could keep out of trouble by preserving neutrality and keeping our nationals and our property out of war zones. World War II and the westward sweep of communism after the war demonstrated the falsity of such beliefs, and the ineptness of the United Nations as a unit showed that either independently or within the United Nations, defensive arrangements with western European powers had to be established. It was obvious that western Europe, divided and alone, could not withstand a Soviet attack. A Soviet victory would destroy potential American markets and narrow generally the world area in which non-communist nations could operate. The United States might be able to forestall an attack by committing itself to a defensive pact and by helping to organize the military defenses of the area. Development of such a pact had to take place in the face of American opposition to entangling alliances and in the face of the fear that the pact itself would precipitate Soviet reprisals. The movement had bipartisan support in Congress, however, with Senator Arthur H. Vandenburg providing notable leadership for the Republicans. In 1949 twelve countries, reaffirming their faith in the purposes and principles of the Charter of the United Nations, agreed to a twenty year regional pact "to promote stability and well-being in the North Atlantic area." The document provided that

> The parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all;

20. *Congressional Record*, December 4, 1947, vol. 93, part 9, p. 11015.
21. *Ibid.*, December 8, 1947, p. 11137.

> and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the party or parties so attacked by taking forthwith, individually and in concert with the other parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.[22]

The signatories were Belgium, Canada, Denmark, France, Great Britain, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, and the United States. The foreign ministers of the twelve countries met in London in May, 1950, further to develop the machinery provided by the treaty and to plan the coordination of the defensive machinery of the several countries.[23] It remains to be seen whether the Atlantic alliance will develop into a counter-balance to the power of the Soviet Union and its satellites. Although the treaty does not absolutely bind the individual members to go to war once any member of the group is attacked, it includes a strong commitment in that direction. Certain it is that the military isolationism of the United States is now a thing of the past.

From this discussion, it is apparent that our foreign policy today, as in the beginning, is based largely on considerations of trade and of security. Practices in pursuit of these ends have changed somewhat with changing circumstances, but the ends have remained fundamentally the same. The American people are still deeply interested in profitable business. They donate billions of dollars to foreign countries not on strictly humanitarian grounds or because they like dispensing charity, but because of the belief — or at any rate of the hope — that such expenditures will restore the possibility of profitable economic interchange and will promote peace. They are hostile to the spread of communism, not so much on highly doctrinaire grounds as on grounds of their observation that when the iron curtain of the Soviet Union drops over a country the result is almost the equivalent of withdrawal of that country from the economic world. Again, the United States makes military commitments and enters into military alliances, not because it likes the military way of doing things but because the possibility of isolation no longer exists, because the United States can no longer protect itself adequately from behind its own frontiers. In terms of vulnerability, the United States has been forced to recognize itself as but a part of what Wendell Willkie emphasized was "one world," and to see that safety can exist only in closer integration of hitherto independent nations. The prosperity of all, furthermore, may well depend upon the speeding of economic integration and cultural integration as well.

Admittedly, for some of that small group who make international affairs almost a profession, to characterize American foreign policy merely in terms of trade and defense is to ignore a supporting structure of idealism which

22. *New York Times*, March 19, 1950.
23. For a chart of the basic machinery see *Semiannual Report of the Secretary of Defense*, July 1, to December 1, 1949, p. 15.

helps to determine the pattern. It is true, of course, that by comparison with the philosophical hardness of the communist approach and the ruthlessness of communist practices, American foreign policy is humanitarian almost to the point of sentimentality. This can be said of it, however, only in such a comparison, and not in a comparison between our foreign policy and our domestic policy. As was intimated in the early chapters of this book, the deeper and more genuine sense of responsibility for the welfare of one's fellow man comes into operation among people most closely related in terms of culture, race, religion, nationality, and place of residence. The "we-group" feeling is most intense at its core and not at its periphery. The suffering of the people whom Bret Harte once labeled "the heathen Chinee" disturbs us less than the suffering of people next door. The communist persecution of democrats in Czechoslovakia, apart from its temporary news value, may disturb us less than the merely verbal bullying of a witness by a congressional committee. So it is that, although humanitarian feeling may broadly supplement selfish interests in securing enactment of welfare legislation in the local community, the state, and the nation, these feelings — again except in contrast with the communist approach — should not be given too much credit in explaining current aspects of American foreign policy. It is unfortunate, therefore, that in times past and particularly during the period just after World War I American discussions of foreign policy should have been carried on so much in terms of a kind of misty sentimentalism which had little relation to the hard facts of international relations. The harsh realism necessary for dealing with the Soviet Union may in this respect administer a desirable corrective. It remains to be seen whether or not our proposal of the Point Four program reflects a genuinely new view of the interrelatedness of peoples everywhere, a realistic reappraisal of the fundamentals of our foreign policy.

References

Gabriel A. Almond, *The American People and Foreign Policy* (Harcourt, Brace, 1950).

Thomas A. Bailey, *The Man in the Street: The Impact of American Public Opinion on Foreign Policy* (Macmillan, 1948).

Hanson W. Baldwin, *The Price of Power* (Harpers, 1949).

Charles A. Beard, *American Foreign Policy in the Making, 1932–1940; A Study in Responsibilities* (Yale University Press, 1946).

———, *President Roosevelt and the Coming of the War, 1941; A Study in Appearances and Realities* (Yale University Press, 1948).

———, *The Idea of National Interest* (Macmillan, 1934).

Edwin M. Borchard, *American Foreign Policy* (National Foundation Press, 1946).

J. C. Campbell, *The United States in World Affairs* 1945–1947 (1947–1948; 1948–1949) (Harpers, 1947. Published annually since 1947).

Edward H. Carr, *International Relations Between Two Wars* (Macmillan, 1947).

———, *The Moral Foundations for World Order* (University of Denver, 1948).

———, *The Soviet Impact on the Western World* (Macmillan, 1947).

Winston Churchill, *The Grand Alliance* (Houghton Mifflin, 1950).
Kenneth Colegrove, *The American Senate and World Peace* (Vanguard Press, 1944).
Edward S. Corwin, *The President's Control of Foreign Relations* (University of Princeton Press, 1917).
———, *Total War and the Constitution* (Knopf, 1947).
John Foster Dulles, *War or Peace* (Macmillan, 1950).
Seymour E. Harris, *The European Recovery Program* (Harvard University Press, 1948).
Lester Markel, *Public Opinion and Foreign Policy* (Harpers, 1949).
Edgar A. Mowrer, *The Nightmare of American Foreign Policy* (Knopf, 1948).
Leo Pasvolsky, director, International Studies Group, *Major Problems of United States Foreign Policy, 1949–1950* (Brookings, 1949).
Dexter Perkins, *The United States in the Caribbean* (Harvard University Press, 1947).
Frederick L. Schuman, *Soviet Politics at Home and Abroad* (Knopf, 1946).

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The Conduct of Foreign Affairs

While the conduct of foreign affairs is not to be understood apart from broad issues of policy such as those discussed in the preceding chapter, it is also not to be understood without attention to the governmental machinery through which foreign policy is made and administered. It involves a maze of activities by much of the machinery of the federal government. Because problems of foreign policy ramify through most domestic problems with which government must cope, the machinery for handling domestic affairs is not to be separated from that which handles foreign affairs. All three branches of government are involved, although the judiciary plays a lesser part than in the domestic field. The President, by contrast with the judiciary, plays a more definitely leading role than in the domestic field. One house of Congress, the Senate, unites with him in the performance of certain important functions. Congress as a whole participates increasingly in the conduct of foreign affairs.

Among the specialized agencies for dealing with foreign affairs, the Department of State is traditionally the most important. Along with it, however, must be considered the Department of Defense, to be discussed in the following chapter, the National Security Council, the Economic Cooperation Administration, and other agencies. The United Nations and its subordinate and affiliated agencies have become implements for expressing various aspects of American foreign policy. Specialized agencies in the Departments of Agriculture, Commerce, and Labor are also important. In spite of the interrelations among these agencies large and small, it is necessary for purposes of discussion to present them separately.

PRESIDENTIAL LEADERSHIP

The basis for strong presidential leadership in the conduct of foreign affairs is established in the Constitution and in the interpretations of the Supreme Court. The Constitution deals with the subject not as a unit but incidentally in its several articles as powers are conferred, restricted, or denied. For understanding the subject it is necessary to refer to the scattered provisions and to the interpretations of them which the courts have

handed down. Differing in this respect from the conduct of domestic affairs, participation is not shared with the states. The federal government has all the power that there is in the field. Much of the President's power is derived from his authority to make treaties, which with the Constitution and the federal statutes are the "supreme law of the land" — of which the Constitution itself provides that "the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Although the President is authorized to make treaties, the advice and consent of the Senate is required to the extent of a two-thirds vote. He nominates ambassadors, other public ministers, and consuls, with the approval of the Senate by a majority vote. He receives ambassadors and other public ministers from foreign nations. In these several capacities, therefore, the President is the spokesman of the United States in the conduct of foreign affairs.

In rationalizing the powers of the President in the foreign field, the Supreme Court has differentiated those powers from his domestic powers. It not only recognized the exclusion of the states from participation but also found for the President an area of power over foreign affairs not derived from the Constitution at all. In the case of United States *v.* Curtiss-Wright Export Corporation the Court noted that

> In this vast realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . . It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.[1]

The Court differentiated the foreign from the domestic powers of the federal government by saying that the latter had come to it by transfer of internal powers which were exercised by the states until the adoption of the Constitution — that is, the federal government became the heir of powers previously possessed by the states. The power of sovereignty in foreign affairs, on the other hand, had never been actually enjoyed by the states but had passed directly from the British government to the Union when the colonies were separated from the mother country. In the domestic field the powers of the federal government were those and those only which had been delegated to it by the states. In foreign affairs, however, the Union had not just those powers delegated to it in the Constitution but all the powers belonging to any sovereign nation whether specified or not. Since the Constitution made the President the spokesman of the nation in the handling of foreign affairs, he had in that field a breadth of jurisdiction which included not merely specific grants but all the powers of a sovereign

1. 299 U.S. 304, 319–20 (1936).

nation. It is hard to say whether this rationalization is justified in terms of highly abstract political theory, but in any event, it pretty well describes the situation as it has developed. The United States does exercise in its foreign relations all those powers exercised in the international field by any sovereign government, and in the exercise of these powers the President, either directly or through his chosen subordinates, is the principal spokesman of the United States.

The President and the Senate. Even though the President is our national spokesman in foreign affairs, the Constitution lays upon him certain important restrictions. Among them, as stated above, is the requirement that the Senate participate in making appointments and give its advice and consent in making treaties. In these capacities, the framers of the Constitution had evidently looked upon the Senate less as a legislative body than as a body of advisers to the President. When there were only thirteen states and twenty-six senators, it was not unreasonable to think of the group as an advisory council. Even in the early period, however, the President and the Senate seem to have dealt with each other with mutual formality tinged with suspicion and without creative interchange of ideas and opinions. As new states were added to the Union and new members to the Senate, it became increasingly difficult for that body to act creatively upon treaties submitted to it by the President. It was driven to a position of approving treaties on the one hand or, on the other hand, of refusing consent to them or of giving it with reservations which embarrassed the President by compelling him to reopen with foreign powers negotiations presumed to be closed.

Just as in the handling of domestic affairs Congress tends to follow the lead of the President when his voice seems to express dominant opinion within the country, so in acting on treaties the Senate tends to follow his lead when he has strong popular backing. As we said in the preceding chapter, however, the American people have not been characterized by informed and settled opinion on foreign affairs. They have tended to be emotional and erratic, to give sporadic attention and then to lose interest. Not being itself well informed about foreign affairs, and lacking the pressure of public opinion to keep it somewhat in harmony with the President, the Senate has gained a reputation for ruthless destructiveness in handling treaties. The most notable example was the rejection after World War I of the multilateral peace treaty which included the Covenant of the League of Nations.

Criticism of the Senate. So it is that the Senate has been bitterly condemned from time to time by members of the State Department who usually negotiate treaties on which the Senate must act. It has been accused of being obstructionist, isolationist, and generally lacking in statesmanship. In such criticisms the department has been joined by advocates of particular treaties which have suffered in the Senate and by advocates

of greater centralization of power in the handling of foreign affairs. The requirement of a two-thirds vote for approval of a treaty has met particularly sharp criticism. It is said to be undemocratic because one person more than the one-third minimum number of senators necessary to constitute a quorum might prevent the approval of a treaty. This possible flouting of democracy is made to seem even more drastic by the suggestion that the senators constituting the one-third of the bare quorum might come primarily from less populous states such as Nevada, Vermont, and Wyoming, thereby expressing the will of only a small fraction of the American people.

In fact, important treaties are never passed upon by a mere quorum of the Senate, and the dissenting group never comes only from the less populous states. This is not to say that Senate action never leaves anything to be desired. It often leaves a great deal to be desired. The reason for its inadequacy, however, is not so much a matter of machinery as of the fact that democratic machinery can be expected to work well primarily in a setting of informed and disciplined public opinion. Lacking this, the American people may well expect that individual prejudices and institutional jealousies between the legislative and executive branches of the government will get in the way of statesmanlike operation. For some time after the close of World War II, the Senate played its part promptly and without unnecessarily obstructing the policy of the President, because both the Senate and the country were informed as to program and knew where they stood on the matters at issue. When during the same period the Senate was slow in passing on treaties or postponed action altogether, its inaction reflected not merely its own lack of sympathy with the President's program but lack of public interest in the question at issue.

Limiting the Senate's Restrictive Power. There is no denying, however, that at times the requirement of approval by a two-thirds majority of the Senate does limit the scope of treaty-making. The framers of the Constitution may well have assumed that treaties were better not ratified at all than ratified when less than two-thirds of the Senate approved. The executive branch in recent years has attempted to limit the restraint on foreign policy which results from the two-thirds requirement. It has attempted to marshal public opinion in support of particular treaties and thus to coerce the Senate into cooperation. When treaties have been worked out at international conferences, Senate leaders have been included among the conferees so as to give the Senate a sense of participation and to eliminate some of its fears that in acting on a treaty presented to it by the President it might be signing a kind of blank check.

Finally, instead of relying always upon the treaty-making power for making international agreements, the administration has at times resorted to what are called executive agreements which, if they require support from any legislative agency, may be sanctioned by a joint resolution requiring a majority vote of each house rather than by a treaty requiring a two-

thirds vote of the Senate. On two occasions well back in history, the admission of Texas to the Union and the acquisition of Hawaii, it has been possible to act on such a joint resolution when a two-thirds vote of the Senate could not be secured. Use of executive agreements supported by joint resolutions rather than by treaties are criticized by those who fear the growing power of the executive branch of the government. It has been sanctioned by the Supreme Court, but no one knows at exactly what point this device must be abandoned and the treaty-making power used if international agreements are to be valid.

Presidential Molding of Public Opinion. Important as are the particular mechanisms prescribed by the Constitution for the conduct of foreign affairs, such as the requirement of support of treaties by a two-thirds vote of the Senate, the fact of over-all presidential leadership is even more important. Not only is the President the one person who, in the conduct of foreign affairs, can speak authoritatively for the United States; he is also the one person who, in theory at least, has access to all the information on the subject that is accumulated by government personnel. As distinguished from members of Congress who represent local constituencies, the President is supposed to be able to think completely in terms of national as contrasted with local welfare. When he speaks on foreign policy, therefore, it is assumed that he is attempting to integrate the desires and aspirations of the American people with the facts of international relations which are available peculiarly to him and which the nation can disregard only at its peril.

In terms of his superior knowledge and his central position, the President must lead; yet he cannot lead by suddenly abandoning any position which the people themselves pretty generally occupy. Whatever his personal attitude toward American membership in the League of Nations, for example, Franklin D. Roosevelt, as President, found it inexpedient to advocate such membership. Whatever his personal view of the so-called neutrality legislation of the 1930's, he found it expedient initially to support such legislation. In so doing he as President was speaking with the voice of the American people. When inside evidence of the menacing growth of dictatorship throughout the world showed him the need to abandon a position of isolationism, he was unable to shift ground immediately. Rather, he found it necessary to move step by step in a slow attempt to readjust the thinking of the American people to new circumstances. He shocked complacency when he suggested worldwide quarantine of unprincipled aggressors. He denounced Mussolini's attack upon France as a "stab in the back." He characterized the United States as the "arsenal of democracy." While denying intention to participate in any "foreign war," he led in building up the defense forces of the United States. The effect of his leadership combined with the impact of the first terrible years of World War II so modified our attitudes that, after Pearl Harbor, he found himself solidly at the head of a nation committed to full participation in the war.

The same process, whereby the President gradually molds public opinion but refrains from flouting the body of public opinion which already exists, is illustrated by trends in attitudes toward Soviet Russia. By the early 1930's the resentments stirred by the Bolshevik revolution and by international propagandizing of communist doctrine had so declined that recognition of Soviet Russia met no strong opposition. The alleged antagonism between Soviet Russia and Nazi Germany reacted somewhat to Russia's benefit in American public opinion. Announcement of the pact between Germany and Russia approximately at the beginning of the war period stirred new antagonism toward Russia, which quickly subsided when Germany invaded Russian territory. In that situation President Roosevelt attempted to aid the Russian war effort, and, after the United States entered the war, to establish collaboration as a full-fledged ally. He attempted, with considerable success, to maintain a spirit of international brotherhood toward Russia at the time of the establishment of the United Nations. Thereafter, however, the difficulty of negotiating and collaborating with the Soviet Union demonstrated the Soviet determination to prevent any return to peace and order on any except communist terms. By March, 1947, public disillusionment in the United States had gone far enough to permit President Truman to assert the "Truman doctrine" of American resistance to totalitarian aggression wherever it might be found, under circumstances where the Soviet Union was obviously the aggressor. Furthermore, utilizing the same resentment against communist tactics, he was able to win support for the Marshall Plan for western Europe as a device for curbing communist expansion. In exercising leadership, a President, whoever he may be, must have the capacity to sense existing public opinion and to estimate the speed at which it can be changed. If his leadership is to be statesmanlike, furthermore, he must have vision as to the impact of particular policies on other countries as well as on his own. This long-range vision is a trait to be sought in any candidate for the presidency.

Another aspect of presidential leadership should be noted. Just as the Senate may show lack of discipline in handling foreign affairs because it lacks the support of informed public opinion, so the President may take advantage of this uncertainty to achieve his own ends. He may try to please foreign minorities in this country for political purposes. He may surrender to his own prejudices in various matters, restrained only by the perhaps differing prejudices of the Senate or of Congress. The need, however, is not so much for a change in machinery as for better public understanding of issues. Because the President has a direct responsibility for the conduct of foreign affairs, a responsibility which is recognized abroad as well as at home, he is perhaps not quite as likely to act irresponsibly as are members of Congress, whose responsibility in such matters is less direct and less clearly recognized.

THE ROLE OF CONGRESS

General Legislation. Although the President, by his own voice or through his subordinates, is our sole spokesman in relations with foreign countries, the broad power of Congress to legislate on foreign as well as domestic affairs makes that body extremely important in the field of foreign relations. Tariff legislation, as it was known down to the time of enactment of the Reciprocal Trade Agreements Act of 1934, was passed by both houses of Congress. It did much to determine the course of foreign trade. The immigration policy of the United States is worked out in Congress. The neutrality legislation of the 1930's, which was expected to keep us out of another world war, was a product of Congress. The power to declare war is specifically vested in Congress. Without funds the government would be powerless, yet borrowing and spending depend upon authorization by Congress. The Constitution, federal treaties, and federal statutes are the supreme law of the land. As law a treaty has the same status as a statute, but not a higher status. If a conflict exists between a statute and a treaty, the one most recently enacted constitutes the law. There is nothing unconstitutional about the abrogation of a treaty by the enactment of a conflicting statute. To violate a treaty in this fashion might conceivably involve the nation in war, but it would not for that reason exceed constitutional power. So it is that a President who would maintain strong leadership in foreign affairs must excel in estimating not only the desires, aspirations, and stratagems of foreign nations, but also the inclinations, prejudices, and ideas of members of Congress. He must concern himself not alone with the Senate in the making of treaties, but with Congress as a whole in its capacity as the principal legislative body of the nation. If he is to be effective, he must combine his leadership of public opinion with his political tactics in dealing with Congress, where dominant public opinion is ultimately reflected.

Congressional Machinery. It is hard for Congress to achieve harmony on foreign policy not only because of the diverse attitudes and interests of its many members but also because particular attitudes and interests become fixed in different parts of its own machinery. Legislation in this field, as in domestic affairs, must pass through committees. Although each house has a specialized committee, called the Committee on Foreign Relations in the Senate and the Committee on Foreign Affairs in the House, many other committees have jurisdiction over important legislation affecting foreign policy. Taxation and spending are provided for by the respective committees in those fields. Legislation on currency control, war, and various other important subjects passes through independent committees, each of which may have an attitude toward the subject matter which differs sharply from the attitudes of other committees and therefore creates problems in the enactment of legislation. An illustration was provided in the preceding chapter in the discussion of the Marshall Plan, which was adopted through

a bill sponsored in the House by the Committee on Foreign Affairs but was thereafter threatened with emasculation by the measure to appropriate the necessary funds as framed by the Committee on Appropriations. Such conflicts in attitude between congressional committees occur again and again and may vitally affect the course of legislation.

The most prominent group in Congress in handling foreign affairs is the Senate Committee on Foreign Relations. In addition to the same matters which pass through the House Committee on Foreign Affairs, the Senate committee also has jurisdiction over treaties and various nominations, and its members in recent years have frequently been called upon to aid in treaty negotiation. After the close of World War II, the State Department established especially close relations with the Senate committee to keep it supplied with background information which was not released to the public. Such a use of the committee has the double effect of bridging the gap between the two branches of the government and of giving the Senate a sound basis for action. True, much depends on the quality of the personnel and the leadership of the committee. It has seldom done better work than during the Eightieth Congress under the leadership of Arthur H. Vandenberg. In accepting an award for distinguished services in October, 1948, Senator Vandenberg declared the award to be a symbol of the work of many other men than himself:

> It is a symbol, for primary example, of the work of the Senate Foreign Relations Committee — and please mark this well — where seven Republicans and six Democrats, after long travail and often after drastic editing, voted unanimously (thirteen to nothing) upon forty-nine treaties, agreements, bills and resolutions, many of transcendent importance, in the Eightieth Congress.
>
> We unanimously closed ranks forty-nine times! I do not disguise my pride in that unique record of service at a moment when America's opponents are waiting to "divide and conquer" us both at home and abroad. Every member of that committee is entitled to this award.[2]

Bipartisanship in Congress. Since the time in the middle of World War II when our national leaders began to plan for the international relations of the future, much has been said about bipartisanship in the conduct of foreign affairs. It has been noted that our foreign policy lacked continuity from administration to administration and that party interests seemed to get in the way of consistent assertion of national interests. It has been noted that our behavior is in strong contrast with that of Great Britain, where parties, however sharp their divisions on domestic issues, stand together to support a consistent foreign policy. As we looked forward to some kind of international union we remembered the way in which a Republican Senate had so emasculated the Covenant of the League of Nations that President Wilson refused to sponsor it in that form. It was argued, therefore, that we must have a consistent foreign policy and that it must be bipartisan.[3]

2. *New York Times*, October 11, 1948.
3. See Harold J. Laski, "The American President and Foreign Relations," *Journal of Politics,* vol. 11 (February, 1949), p. 175.

We got bipartisan support on many important issues in Congress partly because the people knew what they wanted and politicians were ready to give it to them, and partly because of far-sighted leadership of Senator Vandenberg and other Republican leaders. When during 1947 and 1948 the Republicans controlled Congress, the Vandenberg leadership kept the Senate in line with the policy of consistent participation in the solution of world problems which had already been worked out. Great as the influence of leadership undoubtedly was, it was effective primarily in persuading Republican legislators to do what they had to do as an alternative to seeing western Europe succumb to communism, a possibility which horrified Republicans quite as much as Democrats. It did not mean abandoning traditional yearnings toward isolationism which long dominated an important wing of the party, but merely accepting the lesser of evils.

The merits, and particularly the future merits, of bipartisanship in foreign affairs are hard to assess. If Congress is to function as a national legislature, it must act upon issues. As far as political parties reflect division on issues, they would seem to be proper instruments for action on foreign as well as on domestic policy. This does not mean, of course, that the two major parties have to be fundamentally opposed on all issues of foreign policy any more than on domestic policy. There are times when they are in general agreement on the control of agriculture, labor, and business. So also they may be in general agreement on important issues of foreign policy. They need to develop a sense of responsibility in foreign affairs comparable to that needed in domestic affairs, but that does not necessarily mean the abandonment of all partisanship. It is frequently noted that the requirement of a two-thirds vote on treaties usually necessitates bipartisan action, since the majority party is often unable to marshal a two-thirds vote from its own membership. True, this increases the need for bipartisan action, but to repeat, such cooperation is not unique even on domestic issues where party action is supposed to have free play.

The congressional difficulty lies partly in the lack of settled and well-informed public opinion on foreign policy issues, as already noted, and partly in the fact that our foreign program is shaped in the executive branch of the government where the minority party cannot make itself effective. In 1950 President Truman found it advisable to appoint two eminently respectable Republicans, John Foster Dulles and John Sherman Cooper, as advisers to the Secretary of State, not so much to get their technical advice and assistance as to win the support of Republicans in Congress. Senator Tom Connally, chairman of the Senate Committee on Foreign Relations, anonunced the reorganization of subcommittees to consult from time to time with assistant secretaries of state. The move was explained as an attempt to revive lagging bipartisan cooperation. Senator Henry Cabot Lodge, Jr., a Republican member of the committee, said of the move that

> It could mean, if utilized to the fullest, that the Senators from both parties

> would be in on the formulation of policy rather than being called upon to solve problems of policy after they have become almost insoluble.[4]

The comment illustrates both the typical desire of the minority party to participate in policy making and the typical congressional reaction that too many matters are settled in the executive branch without proper presentation to Congress.

Congressional Foreign Travel. The unwillingness of members of Congress to spend billions of dollars abroad and to sanction steps which might result in war, and without direct congressional knowledge of the circumstances under which appropriations were being made, has led to an enormous amount of foreign travel by committees and individual members. During the summer of 1947 when plans were being worked out for systematic aid to Europe, some two hundred members of Congress visited Europe in search of first-hand information.[5] Succeeding years saw similar treks to Europe and to a lesser extent to other foreign areas. There is no doubt that traveling members of both parties learned a great deal about conditions abroad that they would not have learned by reading reports at home. Since Congress is largely a cross-section of the American people in all their variety of traits and abilities, the results were of course not uniformly good, but such travel may well mark the beginning of legislative competence to deal adequately with foreign affairs. It was announced in January, 1950, that the State Department was planning to discuss foreign problems with tourists among the legislators, as a defense against the charge that in planning foreign policy the department was lowering an "iron curtain" between itself and Congress.[6]

THE DEPARTMENT OF STATE

Although the President is the spokesman of the nation in the conduct of foreign affairs, the task of maintaining and supervising relations with other countries requires a huge administrative staff, including men at the policy-making level who can think out policy and program for the President as well as administer it. Much of the responsibility for the conduct of peacetime foreign relations is lodged in the Department of State. This department was the first of the executive departments to be established, and its head, the Secretary of State, outranks all other members of the President's cabinet. The department corresponds to variously named departments and offices for foreign affairs in other major governments, and the Secretary of State corresponds to their foreign ministers.

Top Organization. Seemingly even more than other executive departments, the Department of State is continuously said to need reorganizing.

4. *New York Times*, April 16, 1950.
5. See Walter Lippman, "Today and Tomorrow — The New Power of the House," *Washington Post*, December 29, 1947.
6. *New York Times*, January 8, 1950.

Most new Secretaries of State announce reorganizations which are hailed as instruments of increased efficiency. General George C. Marshall, who was appointed Secretary of State in 1947, is said to have attempted to remodel the department in the image of the General Staff of the Army. Said former Under Secretary Sumner Welles,

> The results were disastrous. A single Assistant Secretary of State, for instance, was made responsible for our political relations with every other country of the world. Former War Department officials and Army officers, wholly devoid of any experience in foreign affairs, were appointed to important administrative positions in the State Department.[7]

Another observer says that the Marshall scheme or organization worked badly because

> He expected the staff to bring policy to the point where he could say "Yes" or "No." If the staff agreed on something, he accepted their decision, usually without question.[8]

The next reorganization, worked out under the jurisdiction of Secretary Dean Acheson and conforming largely to the recommendations of the Hoover Commission [9] of which Acheson had been Vice Chairman, reflected a different conception of administration;

> Acheson tackles the problem sooner, and he questions to the end. Then he goes off on his own and summarizes the problem and solution as he sees them, brings back his brief and lets the relevant committee pick it to pieces. In this way he is constantly in control of policy-making, and this is a change of some significance.[10]

Under the present arrangement the department has a top command of four individuals. At the head, of course, is the Secretary himself. Joined with him is the Under Secretary and two Deputy Under Secretaries. One of these two is called Deputy Under Secretary for Administration.[11] The other has jurisdiction over "substance," or "policy." These four men "run" the department. Directly beneath them in rank are eight Assistant Secretaries and a Counselor and a Legal Adviser, both of whom have the rank of assistant secretary.

The actual operation of the top command in the department varies from time to time depending on the pressures of the moment and on the personalities of the leaders. As of January, 1950, it was noted that the three immediate subordinates of the Secretary, together with the man who was at once Counselor and Director of the Policy Planning Staff, met with the Secretary every morning at 9:00 o'clock.

7. Sumner Welles, "Changes at State," *Washington Post*, February 1, 1949.
8. James Reston, "Secretary Acheson: A First-Year Audit," *New York Times Magazine*, January 22, 1950, p. 35.
9. *Foreign Affairs*, House Doc. No. 79, 81st Cong., 1st sess.
10. Reston, *op. cit.*
11. See the statement of Carlisle Humelsine, Director of the Executive Secretariat in the Office of the Secretary, *Department of State Appropriations for 1951*, Hearings, Subcommittee of the Committee on Appropriations, 81st Cong., 2d sess., p. 540.

> They understand perfectly that the President and the Secretary set over-all policy; that they are instruments for carrying out the details. They bring Mr. Acheson up to the minute on overnight cables, receive his instructions and divide the day's assignments. The efficiency of staff work is evidenced by the fact that these meetings usually last only fifteen minutes.[12]

The Under Secretary, in turn, met three times a week with a larger group, including the Assistant Secretaries and others,

> for an hour's discussion of pending business, which ranges across the world. Any official who has an important problem sets forth his ideas for handling it, receives the criticisms of the group, and decides on the form his action of statement should take. This goes to the Secretary for disposition.[13]

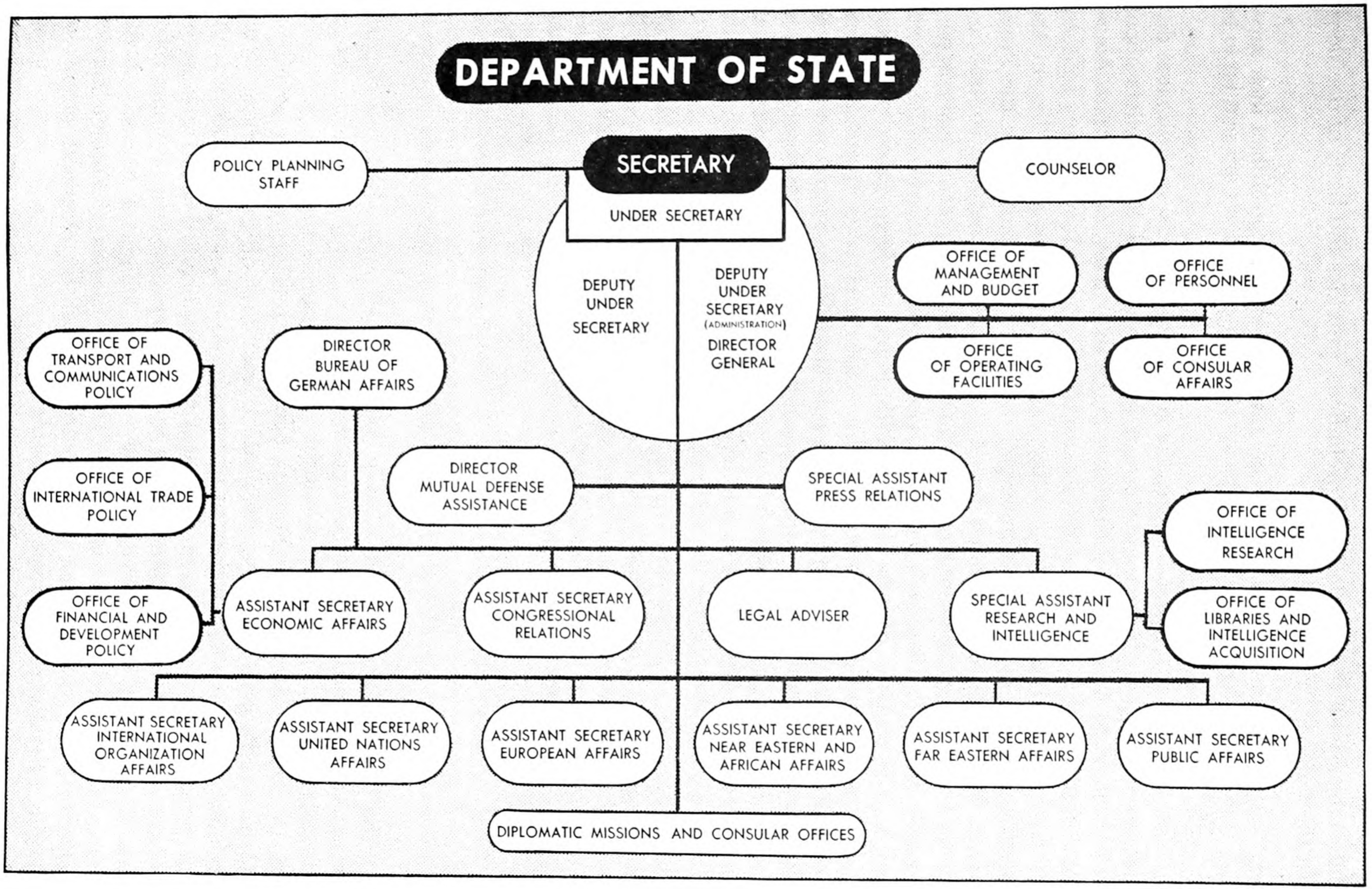
To repeat, however, organization and procedure change with changing needs. In April, 1950, for example, it was announced that top leadership would be reshuffled to the extent of providing for a Strategy Committee to plan for the "cold war" with the Soviet Union. The committee was to be headed by an Ambassador at Large, Philip C. Jessup, and was to include the head of the Policy Planning Staff, the Assistant Secretary of State for Public Affairs, the Assistant Secretary for Economic Affairs, the Legal Adviser, and perhaps others. The Strategy Committee was to maintain the consistency of cold war strategy throughout the world. In assuming this function it was to free the Policy Planning Staff of the Department for long range planning of foreign policy as distinguished from day-to-day strategy.[14] It was clear, however, that this was but a temporary arrangement in the continuing adjustment of machinery to national needs.

Subordinate Organization. Current organization of the department emphasizes regional divisions. Four Assistant Secretaries head regional bureaus, which are in turn broken down into sub-regional offices. The Bureau of European Affairs, for example, includes the Office of Eastern European Affairs, the Office of Western European Affairs, the Office of British Commonwealth and Northern European Affairs, and the Office of European Regional Affairs. Another Assistant Secretary heads a Bureau of United Nations Affairs, which is in turn broken down into four offices. The other three Assistant Secretaries supervise matters which are not divided regionally, such as publicity, international economic relations, and departmental relations with Congress.

Power over the conduct of foreign affairs is exercised not only by the Secretary and his immediate subordinates but also by permanent staff members in subordinate positions. These officers have this power because through them is derived information on which policy decisions must often be based. Because some of them have become regional experts as on Afghanistan, Argentina, China, or Iran, their expert knowledge, inevitably

12. Harold B. Hinton, "Strategists of 'State,'" *New York Times Magazine*, January 8, 1950. p. 8.
13. *Ibid.*
14. See James Reston, "U.S. Will Create Policy Staff to Plan 'Cold War' Strategy," *New York Times*, April 14. 1950.

DEPARTMENT OF STATE


POLICY PLANNING STAFF
SECRETARY
UNDER SECRETARY
COUNSELOR
DEPUTY UNDER SECRETARY
DEPUTY UNDER SECRETARY (ADMINISTRATION)
DIRECTOR GENERAL
OFFICE OF MANAGEMENT AND BUDGET
OFFICE OF PERSONNEL
OFFICE OF OPERATING FACILITIES
OFFICE OF CONSULAR AFFAIRS
OFFICE OF TRANSPORT AND COMMUNICATIONS POLICY
DIRECTOR BUREAU OF GERMAN AFFAIRS
OFFICE OF INTERNATIONAL TRADE POLICY
DIRECTOR MUTUAL DEFENSE ASSISTANCE
SPECIAL ASSISTANT PRESS RELATIONS
OFFICE OF INTELLIGENCE RESEARCH
OFFICE OF FINANCIAL AND DEVELOPMENT POLICY
ASSISTANT SECRETARY ECONOMIC AFFAIRS
ASSISTANT SECRETARY CONGRESSIONAL RELATIONS
LEGAL ADVISER
SPECIAL ASSISTANT RESEARCH AND INTELLIGENCE
OFFICE OF LIBRARIES AND INTELLIGENCE ACQUISITION
ASSISTANT SECRETARY INTERNATIONAL ORGANIZATION AFFAIRS
ASSISTANT SECRETARY UNITED NATIONS AFFAIRS
ASSISTANT SECRETARY EUROPEAN AFFAIRS
ASSISTANT SECRETARY NEAR EASTERN AND AFRICAN AFFAIRS
ASSISTANT SECRETARY FAR EASTERN AFFAIRS
ASSISTANT SECRETARY PUBLIC AFFAIRS
DIPLOMATIC MISSIONS AND CONSULAR OFFICES

intermixed with their beliefs and prejudices, provides the basis of decisions In the language of one observer,

> The working-level men are in many respects more powerful than their superiors — for they set the facts in perspective before the facts are sent up to be acted upon.[15]

The higher department officers, the Secretary and his subordinates discussed above, also have their store of knowledge and their beliefs about what ought to be done, and therefore make their own impact upon American foreign policy. Because the stream of policy is fed from many sources, it is often hard to tell whether the responsibility for action lies in the permanent staff of the department, in the political officers, or in the President. Presidents have at times found the department hard to control and have been known to grumble about the difficulty of getting from it particular items of authentic information. On the other hand, strong Presidents such as Woodrow Wilson and Franklin Roosevelt have taken particular problems of foreign policy so completely into their own hands that they virtually became their own Secretaries of State for handling problems. A President who is less strong and less self-assured may leave foreign policy pretty much in the hands of the department or may intervene in somewhat erratic fashion. The desire of the department to claim broad responsibility for itself is indicated by the following statement of purpose:

> The principal responsibility for the determination of the policy of the government in relation to international problems devolves upon the Department of State. Some of the more vital decisions on questions of foreign affairs are made by the President, but the day-to-day international negotiations, the specific measures for promotion of solidarity with friendly countries, the development of policies and programs for American participation in the United Nations and other international organizations, and the conduct of the voluminous correspondence with the diplomatic and consular representatives of the United States as well as with the representatives of foreign powers accredited to the United States, are delegated to the Department of State.[16]

The Foreign Service. The primary instrument through which the Department of State maintains its contacts with foreign governments, carries on negotiations, and accumulates relevant information is the Foreign Service of the United States. The Foreign Service, a product of long evolution, maintains its own merit system distinct from that of Civil Service Commission, and has its own pattern of organization. Foreign Service officers, as provided by the Foreign Service Act of 1946, are divided into seven classes, with "career ministers" at the top. Career ministers, of whom there are four classes with varied salaries, serve as Chiefs of Mission at the various posts throughout the world. The other classes of Foreign Service officers serve under them, and all are assisted by classified groups of Foreign Service staff officers and employees.

15. John Chamberlain in an article quoted in the *Congressional Record*, July 15, 1947, vol. 93, part 12, p. A 3517.
16. *United States Government Organization Manual 1949*, p. 87.

The Chiefs of Mission, known as ambassadors and ministers, represent the United States at seats of government in foreign countries. It was formerly the custom to send ambassadors to embassies at the more important posts and ministers to legations at posts which were less important. The distinction in importance is tending to disappear, but the separate designations remain. It is the function of ambassadors and ministers to negotiate agreements, accumulate information by observation and mingling with people likely to have it, and to communicate with department officials in Washington about matters of interest to the United States. In times past these highest officers of the diplomatic service have usually not been career men; they have usually been appointed because of service to a political party, friendship with the President, wealth, or occasionally unique ability to perform particular negotiations. Since wealth, friendship, and party loyalty are not necessarily criteria of ability to negotiate effectively with foreign people in foreign lands, our representation has often been poor. Among the qualities needed are keen observation, ability to associate widely and on at least a superficial basis of friendship, all the varied skills of shrewd bargaining, and ability to exercise initiative and at the same time faithfully to obey orders from the government at home. The education of a man who would deal at first hand with a Churchill or a Molotov, or who would explain the pattern of changing conditions in China or Turkey or Argentina, is a matter of a lifetime. It must include an infinite variety of training and experience on a basis of high native ability. It is hardly more than accident when such qualities are possessed by men whose outstanding claim to appointment is faithful party service. Since salaries are relatively low for such abilities, the government has been fortunate in finding even a few extremely able men to occupy leading diplomatic posts at critical times.

Foreign Service Officers. Attempts to improve the quality of American representation abroad have been under way for more than a quarter of a century. By the Rogers Act of 1924, the diplomatic and consular services were merged into the category of foreign service officers as designated above. The diplomatic service originally included the professional subordinates of the Chiefs of Mission who did for them much of the routine work of embassies and legations and at times the substantive work as well when expert service was required. The consular service, on the other hand included consuls and vice consuls stationed at various points in foreign countries to give protection to American nationals and their interests and to accumulate agricultural and commercial information. Within the category of foreign service officers, young men moving up from grade to grade may now be shifted not merely from embassy to embassy and consulate to consulate but back and forth between the two types of work in order to broaden their information and equip them for service at higher levels. In their various positions, they perform services not only for the Department of State but for the Departments of Agriculture, Commerce, and Labor and for other agencies. The purpose is to develop not a narrow expertness in

the performance of a particular job in a particular country, but a broad and facile expertness which will improve the government's ability to cope with the ever-changing pattern of foreign affairs.

With the growth of ideologies in other countries which might work injury to the United States, the government is giving increased attention to keeping its foreign service officers Americanized. It breaks up or prevents too deep attachments to particular foreign countries by shifting men from one country to another. It forbids marriage to an alien without approval by the government. It brings foreign service officers home from time to time for service in the State Department and for further training in the Foreign Service Institute which was provided for by the Foreign Service Act of 1946. Careful screening by written examinations and interviews, coupled with an intensive course of initial training and later sporadic training after service abroad, will, it is believed, give the United States a representation abroad which will be worthy of deepest respect.

It is hoped that eventually a large percentage of the Chiefs of Mission as well as diplomats at lower levels will have had career service training. Already some ambassadors and a number of ministers have had careers as Foreign Service officers. This fact is not too significant, since most of this group entered at the lower levels at the time when wealth, family prestige, and social connections had much to do with the choice of the diplomatic service as a career. It remains to be seen whether the type of training and experience now being provided for young men in the lower ranks will develop the kind of ability needed in top positions. It is widely argued that the discipline of foreign service, which puts a premium on longevity and inoffensiveness as criteria for promotion, curbs development of the initiative needed for top leadership.

"Roving Ambassadors." Whatever the several reasons, the President and the State Department find it advisable from time to time to rely not upon Chiefs of Mission or career foreign service officers but upon specially chosen representatives to conduct negotiations abroad. In critical times, indeed, three Presidents — Wilson, Franklin D. Roosevelt, and Truman — have themselves headed missions to important international conferences. During and immediately after the close of World War II, a number of countries began to rely on a council of foreign ministers, which includes our Secretary of State, for the consideration of critical international problems. The Secretary of State participated in the conference in San Francisco for establishment of the United Nations. He has represented the United States at meetings of that organization, and he has constituted the head of the American delegation at various other international conferences. The former Under Secretary of State for Economic Affairs, William L. Clayton, performed similar functions in the development of the Marshall Plan. During war and in other periods of emergency, the President has frequently found it advisable to send abroad for particular purposes men assigned to no particular post and having no background of diplomatic experience but

who, because of their specialized knowledge or ability or relation to the President, could be expected to perform more adequately than the diplomats already in the field. Established diplomats may well resent such practices, and morale and efficiency may thereby be impaired; but the President may feel that the price has to be paid.

This short circuiting of diplomats in the field is sometimes duplicated by the short circuiting of the State Department at home. Instead of acting through the Secretary of State, the President may, as Franklin D. Roosevelt sometimes did, deal directly with ambassadors abroad, even establishing a code of communication known only to himself and the ambassador. Although Secretary of State Hull found such practices extremely irritating, the President preferred to get his information direct rather than have it filtered through agencies and individuals in the Department of State. Such practices sound like bad administration, but, paradoxically, they may be necessary to good government.

The Changing Character of Diplomacy. The Hoover Commission noted that

> up to about 1924 social prestige and protocol considerations were paramount in the minds and actions of the bulk of Americans concerned with foreign affairs. From this grew the conception of State Department and Foreign Service personnel as being primarily concerned with tea parties and striped pants. Today, as a result of the Rogers Act of 1924 and the Foreign Service Act of 1946, and as a result of foreign affairs being injected as never before into the main stream of American life, this fact is no longer true, but the memory lingers on and will persist for at least another generation.[17]

Certain it is that the personnel of foreign affairs departments in governments all over the world, and particularly foreign service officers, have set themselves apart from their own peoples in the development of diplomatic language and usages so that they have at times seemed to have more in common with their own group without respect to nationality than with the people whom they are expected to serve. The language of diplomacy has been one of excessive formality and superficial politeness. While this is not entirely without justification, in view of embarrassing difficulties which may attend diplomatic relations between people of different languages and customs, it can also be extremely irritating to the uninitiated. In the British declaration of war against Japan on December 8, 1941, Winston Churchill used the customary ceremonial forms, concluding with the words,

> "I have the honor to be, with high consideration,
> Sir,
> Your obedient servant,
> WINSTON S. CHURCHILL."

He later remarked, "Some people did not like this ceremonial style. But after all when you have to kill a man it costs nothing to be polite."[18]

17. *Foreign Affairs, op. cit.*, p. 7.
18. Winston S. Churchill, *The Grand Alliance* (Boston: Houghton Mifflin, 1950), pp. 610–11.

By contrast, Secretary of State Cordell Hull abandoned diplomatic ceremony in castigating the representatives of Japan who brought him the Japanese declaration of war against the United States in the form of a document making a series of accusations. Said Hull to the diplomats,

> In all my years of public service I have never seen a document that was more crowded with infamous falsehoods and distortions on a scale so huge that I never imagined until today that any government on this planet was capable of uttering them.[19]

Washington gossip carried the story that Hull had roasted the Japanese with a display of the Tennessee mountain profanity which he sometimes used under stress. This he denied. No "cussing out," he said, could have made his denunciation any stronger.[20]

Representatives of the Soviet Union have had little use for the extreme ceremonialism of conventional diplomacy. Their lack of training and skill in playing the verbal game may be one reason why. The basic explanation, however, probably goes deeper. They tend to regard most of the rituals, customs, and standards of capitalist nations as instruments for perpetuating what they regard as decadent bourgeois governments. They prefer to get down to the crude, raw facts of life. By non-communist standards they are likely to be blunt to the point of insult. Western nations have gradually come to feel that they must answer the Soviet Union in kind in order to make any impression at all. Ceremony, therefore, often gives way to language clearly implying, if not saying outright, that diplomatic opponents are liars or thieves. This change is too new for objective appraisal. Among most peoples a measure of politeness still has value in maintaining friendly relations. It may be that the crudity which seems necessary in dealing with the Soviet Union will impair the relations among other peoples. On the other hand, ceremonial language with implications clear only to a diplomatic elect is clearly outmoded in a world in which representatives of distant countries talk with one another freely by long distance telephone and in which innumerable officials with varied duties, such as traveling congressmen, agents of the Economic Cooperation Administration, agents of the Export-Import Bank, and many others constitute an informal diplomatic corps often quite as influential as the professional diplomats. We need a simple and clear standard of communication which still does not abandon courtesy.

Recognition. The United States has formal diplomatic relations only with those governments which it "recognizes." The statement can be phrased in reverse, however, to say that recognition constitutes the establishment of formal diplomatic relations with the country recognized. In general the United States tends to recognize every new government which is ready to maintain diplomatic relations with us and which shows evidence of inten-

19. *The Memoirs of Cordell Hull* (New York: Macmillan, 1948), vol. II, p. 1096.
20. *Ibid.*, p. 1097.

tion and ability to observe the rules of international law. We withheld recognition of the Soviet Union from 1918 until 1933 not merely because we disapproved of communism but because of apparent Soviet unwillingness to protect personal and property rights as international law required. In connection with newly established revolutionary governments in Latin America, it is true, the United States has at times withheld recognition because of dislike for the regime or the way it came into power, and has been able to weaken some such governments by withholding the recognition of the most powerful nation in the Western Hemisphere. There is often a temptation to use the power to grant or withhold recognition for the purpose of influencing the conduct of the government concerned.

Since recognition is a formal matter, and not to be taken as a sign of approval of the government in question, refusal to grant it is not necessarily an unfriendly act. When recognition is virtually nullified, however, by withdrawal of our diplomatic representatives from the foreign capital and dismissal of those sent to Washington, the act is a definite rebuff. Such a rebuff may be invited, as when in the late 1940's and in 1950 Bulgaria so mistreated our representatives that we had to close our legation in Sofia and dismiss the Bulgarian representatives in Washington. Other Soviet satellites invited the same treatment. Recognition, therefore, is two-sided and must be desired by both parties to be effective. While for strategic purposes we may have hoped to keep listening posts in all the satellite countries, the Soviet policy in certain instances seemed to be to crowd us out.

The communist government in China, by imprisonment and other contemptuous treatment of our representatives to the Nationalist government, showed no interest in establishing diplomatic relations with the United States. The question, therefore, was quite as much whether the Chinese government wanted recognition as whether we wished to grant it. Although the deciding factor in this situation may be the desire of the Soviet Union to keep the United States without connections to Communist China, the fact remains that China must play its part if diplomatic relations with the United States are to be established and maintained.

The "Voice of America." When the United States was maintaining a largely isolationist position, assuming that it could avoid war and carry on a profitable trade with the rest of the world merely by avoiding involvement in foreign quarrels, it had little reason to try to keep the rest of the world informed on what the United States was like. In a phrase used by Theodore Roosevelt, it had but to "speak softly and carry a big stick." In time of war, however, and particularly during World War II, the situation was very different. Then an important part of the world was peopled by enemies of the United States. Other parts of the world were likely to choose between alliance with us and with our enemies. Through the Office of War Information and other agencies, the government found it necessary to portray the United States in a favorable light and to combat the charges and claims of

the enemy. With the close of the war, the Office of War Information was dissolved and its propaganda functions transferred to the Department of State where it was found necessary to continue them because of a flood of hostile propaganda from one of our wartime allies and because, instead of retreating into isolation, the United States was determined to play a leading part in world affairs. In its efforts to disintegrate popular governments in western Europe and elsewhere, the Soviet Union's skilled propagandists poured out denunciations upon the allegedly decadent American capitalism after the pattern earlier followed by Nazi Germany and attempted in every way possible to create hostility toward the United States. It was necessary, therefore, to meet accusations with counter-propaganda.

To do so we found it necessary to re-expand our European broadcasting facilities, along with services in the form of books, magazines, newspapers, and other materials favorably portraying the United States and the democratic way of life. In addition we carried the propaganda war to the enemy by beaming programs into the satellite countries and into the Soviet Union itself. Our effectiveness in stirring interest was indicated by the bitterness of the Soviet response. Eventually the Russians devised techniques of jamming programs so that it was extremely difficult to make them heard. In January, 1950, the Chief of the International Broadcasting Division of the Office of International Information in the State Department explained that

> today we have lost the mass audience that we used to have in the Soviet Union, and it certainly was a mass audience, to our conviction. All of our evidences of the probable audience of the Voice of America in Russia, before the jamming, were shown to our satisfaction to be underestimates by the extent to which the Russians were willing to and did attack us through every medium at their command; the Soviet press, and the Soviet radio. extending to the farthest provincial papers. And that, of course, in our mind was again confirmed when this tremendous jamming operation was undertaken.[21]

So it was that this new instrument of international communication — and of diplomacy — was at least partly and temporarily neutralized in the Soviet Union by competing engineering techniques. It remains to be seen how successfully we can devise techniques of cutting through the jamming. We continue to broadcast on a considerable scale to Europe, Latin America, the Far East, and the Near East.[22] This service supplements and therefore largely modifies the work of our diplomatic representatives in maintaining relations with foreign countries.

Since propaganda on a worldwide scale is a new activity for the United States, it is not surprising that our performance has sometimes been crude. We have great difficulty in describing the American way of life so as to win the approval and friendship rather than the envy or scorn of foreign listeners. We have not learned how best to meet some alien criticisms. We

21. *Department of State Appropriations for 1951*, Hearings, Subcommittee of House Committee on Appropriations, 81st Cong., 2d sess., p. 1050.
22. *Ibid.*, p. 1056.

cannot explain away the damage done by the upward and downward sweeps of business cycles, the inequities in distribution of income, and the prejudice revealed by racial discrimination. Our case is better than we have thus far learned to state it, and the art of foreign education and propaganda will have to be mastered if we are to play our rightful part in world leadership. Something is being done by way of cultural interchange, as in the exchange of students and teachers between the United States and foreign countries. It is obvious, however, that the United States has made only a beginning at a very difficult task.

DOMESTIC RELATIONS OF THE DEPARTMENT OF STATE

Public Relations. In times past the relations of the Department of State with the domestic public have not been good. Like most foreign offices, the department has not kept the people well informed about its activities and the reasons for them. It has been highly conscious of its right, and sometimes its duty, to restrict information, and has been supercilious of requests for it even from members of Congress.[23] The department is critical of public opinion because it lags behind the factual evidence which ought to mold it, yet the department often unnecessarily hoards that evidence in its own files instead of making it available. It asks the people to trust its judgment without adequately disclosing the basis of its judgment. An example appears in a book published by the department in 1943 to show the accumulation of evidence on the war plans of the Axis powers, evidence which had been available to the President and high officers of the Department of State but had not been available to the people. Yet the department deplores the failure of public opinion to keep up with the facts:

> During a large part of the period with which this volume deals, much of public opinion in this country did not accept the thesis that a European war could vitally affect the security of the United States or that an attack on the United States by any of the Axis powers was possible. In this respect it differed from the President and the Secretary of State, who early became convinced that the aggressive policies of the Axis powers were directed toward an ultimate attack on the United States and that, therefore, our foreign relations should be so conducted as to give all possible support to the nations endeavoring to check the march of Axis aggressions.
>
> Our foreign policy during the decade under consideration necessarily had to move within the framework of a gradual evolution of public opinion in the United States away from the idea of isolation expressed in "neutrality" legislation and toward realization that the Axis design was a plan of world conquest in which the United States was intended to be a certain, though perhaps ultimate, victim, and that our primary policy therefore must be defense against actual and mounting danger. This was an important factor influencing the conduct of our foreign relations.[24]

23. See W. M. K. in *Kiplinger Magazine,* July 1, 1947, reprinted, *Congressional Record*, July 16, 1947, vol. 93, part 12, p. A3560.
24. Department of State, *Peace and War: United States Foreign Policy 1931–1941* (1943), p. 3.

The discussion ignores the fact that the slowness of the American people to recognize the inevitability of our involvement in war was due in part to the fact that the information coming to the President and to the department was not made generally available. The implication of the department's position is that the people ought trustingly to follow the President and the department in matters of foreign policy without insisting on seeing the evidence, in spite of the fact that such is not the way of democracy. If people are to govern themselves, they must have access to the relevant facts. The war plans and preparations of the Axis powers were already known to the planning nations. Disclosure of the limited information possessed by our government would have given no new information to our future enemies. The most they could have learned from such disclosure would have been the fact that American officials were accumulating fragments of information about their activities, and this they must have assumed already. Withholding information from our own people, while it has a variety of excuses and no doubt is sometimes justified, is in part the product of the "cloak and dagger" atmosphere which still somewhat enshrouds the practice of diplomacy.

State Department Publicity. Education of the public on the bases of action in foreign affairs is a crying need of the times. The Department of State is developing publicity and propaganda facilities for molding public opinion. Speeches by the Secretary and his immediate subordinates are carefully planned to deliver the chosen publicity impact. Speakers of lesser rank are sent far and wide to talk to organizations of various kinds. Says a departmental document entitled "The Office of Public Affairs of the Department of State":

> A small staff of specialists works with the leaders of American organizations which have requested information and liaison services of the department. These include, among many others, organizations representing religious, farm, veteran's, women's, labor, professional, fraternal, civic action, and business groups. The work of the liaison officers with these organizations places the State Department in contact with many millions of people each year. There are over 6,000 national civic organizations in this country, over half of which concern themselves with foreign affairs and are in touch with the Division of Public Liaison, although at present the division concentrates on the 650 national and 400 local organizations which have asked for specific services from the department.

While molding public opinion through contacts with civic organizations may be a laudable service, its value will depend primarily on the extent to which it consists of providing information not otherwise available, or merely of giving pre-digested facts in support of previously made policy without the background information necessary for the exercise of independent judgment.

The Foiling of Spies. Persons connected with embassies and legations have what is called diplomatic immunity, which entitles them to go and

come without official search of their persons or baggage. Records of confidential information may therefore be carried back and forth with danger of discovery only through espionage by agents of some other country. Our representatives abroad are always on guard against such espionage and of attempts to listen in on their conversations through tapped telephone wires and even concealed dictaphones placed in their offices and homes.

Important communications which cannot be carried in person are usually transmitted in code in the hope that they can be read only by the people to whom they are sent. Of the codes in use when war broke out in Europe, it is said by a former ambassador to France that

> The codes of the department were so antiquated that, in the opinion of the President, they had been broken by all the totalitarian powers. Furthermore, leakages from the department included publication of strictly confidential telegrams almost without alteration of a word. This matter was brought to the attention of the Secretary of State, but he was unable to stop the leakages. It was not in disrespect to Mr. Hull, who is one of the most discreet of men, but in the interest of security, that communications between President Roosevelt and myself frequently passed by other channels than those of the Department of State.[25]

During the war our codes were vastly improved and highly mechanized, so that breaking them became exceedingly difficult. About all this the public had little information. A considerable amount of excitement was caused in the late 1940's when it was discovered that well before the beginning of World War II documents had been removed from the files of the Department of State by means of which codes then in use could have been broken by foreign agents. The code problem, which in large part the government had already secretly met and solved, was a new problem to the people now hearing about it in terms of exciting spy stories.

The problem of preventing disclosure of important information to enemy agents, along with other problems of loyalty among government employees, have not as yet been adequately solved. The discovery in 1948 of Department of State documents and microfilms of documents which had been removed from the files for transmission to communist agents justified suspicion of communist infiltration into strategic positions in the government. It is obvious that better techniques of appraising the loyalty of government employees need to be worked out without, at the same time, developing a staff of employees so timid and fearful that its lack of stamina will be a more serious menace than the possible presence of foreign agents. In dealing with problems of loyalty in the government, it must be remembered that espionage has changed almost as much as warfare. The information of greatest value to a possible enemy is not likely to be a document filched by a disloyal American from State Department files or slipped from a diplomatic brief case by a seductive siren. Rather it is evidence of the production and shipment of raw materials, the manufacture of key supplies, and the as-

25. Letter, William C. Bullitt to the editor of the *New York Times,* February 16, 1948, published in the *Times* of February 19, 1948.

sembling of equipment at given points. Most such information is accumulated not by dramatic methods but by careful study of published records and by first-hand observation of activities which cannot be kept secret. In this respect the United States is vulnerable as the iron curtain countries are not, but it is likely to go on preferring that vulnerability to the price it would have to pay if it were to create an iron curtain all its own. To eliminate spies the Department of State can use its own investigative agents, the more elaborate organization of the Federal Bureau of Investigation, and the Central Intelligence Agency, which operates under the National Security Council. There is no way, however, of cutting off all information concerning dominant productive and commercial activities in the United States.

Department Relations with Congress. As already indicated, the Department of State has more difficulties in its relations with Congress than has any of the other executive departments. This is true because of the difficulty of the subject matter and the lack of congressional familiarity with it, because the Department of State has a responsibility to watch the foreign repercussions of what is said and done which other departments do not share, because of its traditional aloofness and attitude of superior wisdom toward elected politicians, and for other reasons. Even when Secretaries of State are themselves former members of Congress, as were Cordell Hull and James F. Byrnes, they operate as the instruments as well as the heads of their departments, and sooner or later come in conflict with their former colleagues. It is so much the worse if they lack political experience and display the characteristics of "intellectuals." In a discussion of Secretary Acheson it has been said that

> Congressmen as a rule do not like brilliance. They do not mind being mangled in a long awkward brawl, but they rather resent being decapitated by a single whistling sentence.[26]

It is no doubt because of the perennial strain between the department and Congress that members of Congress victimize the department as much as they do by accusations of harboring communists and perverts and mismanaging the business of the government.

Proposals for improving relations between the department and Congress are constantly being made. The Hoover Commission stressed the need for a full-time Assistant Secretary in the department to establish a two-way liaison with Congress, a need which was recognized in the departmental reorganization of 1949. He was to accumulate information from the department for the use of Congress and bring to the department the views of congressional leaders. However,

> It is not intended that this Assistant Secretary should serve as the exclusive channel of communication between the State Department and the Congress. On frequent occasions the Secretary and the Under Secretary will be called upon to consult with congressional leaders. In addition, the Assistant Secre-

26. James Reston, "Secretary Acheson: A First-Year Audit," *New York Times Magazine*, January 22, 1950, p. 9.

> tary will have to be able to call upon various specialists within the department to provide information on technical phases of foreign affairs activities. He will also have to work with the budget officers of the State Department in connection with appropriation matters. Where congressional contacts are made directly by other departmental officials, the Assistant Secretary should be kept informed.[27]

As discussed earlier, various secretaries have devised ways of maintaining contacts between the department and the congressional committees having to do primarily with foreign affairs. In spite of the traditional opposition to the appearance of heads of departments before Congress as a whole, Secretary Hull addressed a joint session of the two houses in the hall of the House of Representatives on November 18, 1943, to report on four-power discussions in Moscow. He did not, however, submit to questions from the audience. On May 31, 1950, Secretary Acheson addressed the membership of the two houses in a hall of the Library of Congress and did permit questions to which he gave general answers. There was little evidence, however, that the device had such an effect on departmental relations with Congress as to call for frequent repetition. One difficulty is that even if a Secretary of State succeeded for a time in bridging the gap between the department and Congress he might in doing so merely succeed in driving a wedge between himself and the President — who, after all, is the commanding officer of the secretary and of the department.

OTHER FOREIGN AFFAIRS AGENCIES

The Economic Cooperation Administration. A number of other agencies share in the management of our foreign affairs. The Economic Cooperation Administration was set up to administer the Marshall Plan. Selection of an administering agency was one of the difficult tasks connected with adoption of the plan. Since the plan represented basic strategy in foreign policy, the Department of State, for whose Secretary it was informally named, urged that the department should be given control of its administration. To locate administration elsewhere, it argued, would mean setting up a separate and, in a sense, a rival organization. Friction which had resulted from such rivalry during the war, when the Office of War Information, the Foreign Economic Administration, and other agencies operated parallel with State Department agents, seemed to justify the contention that control should be centralized. Critics of the stand-offish and superior attitude of the Department of State, however, together with friends of business interests who were hostile to the Truman administration generally, succeeded in establishment of a separate agency known as the Economic Cooperation Administration.[28]

27. *Foreign Affairs, op. cit.*, p. 54.

28. Congress considered the additional argument that the Department of State ought to concern itself primarily with defining our foreign policy objectives rather than with action programs such as the administration of aid to needy countries. The Hoover Commission noted that "In this instance the advantages in creating a new agency appear to have been overwhelming and the solution is in accord with the principle of this recommendation." *Ibid.*, pp. 32–33.

So it is that ECA, headed by an administrator responsible not to the Secretary of State but directly to the President, was set up to supervise the expenditure of billions of dollars in the countries to which aid was to be given and, in that connection, to carry on negotiations with the countries involved much as negotiations in other matters are carried on through the Foreign Service. The separation between the ECA and the Department of State has its good points and its bad. It seems clear that, even if administration had been placed under the jurisdiction of the Secretary of State, an agency largely separate from the permanent machinery of the department would have been needed. The problem of separation, therefore, is largely one of the extent to which coordination can be provided at the top through the President rather than at the next lower level through the Secretary of State.

The Office of International Trade. For purposes of better centralized administration the large number of commercial attachés once maintained in foreign countries by the Bureau of Foreign and Domestic Commerce of the Department of Commerce were transferred to the jurisdiction of the Department of State. The Department of Commerce, however, through its Office of International Trade still plays an important part in the conduct of foreign affairs. That office administers legislation which requires that licenses be secured as a prerequisite to exporting commodities. One purpose of the legislation has been to retain in the United States commodities in critically short supply and to curb inflation which free foreign purchasing might bring about. The Office of International Trade checks on the uses made of exports. It restricts or prevents the shipment of some commodities to the Soviet Union and its satellites and favors shipments to friendly countries. Instead of dealing primarily with the profits of exporters, it grants licenses in such a way as to encourage exporting at low cost in order to conserve dollar supplies in countries to which aid is being given. The program of control is an emergency program, but for the time being it exercises an important influence on American trade relations.

The National Security Council. The departments included in the National Security Council, which will be further discussed in the following chapter, have in critical times had almost as much to do with the conduct of foreign affairs as the Department of State. Because of interaction and overlapping of activities among the several departments, Congress in 1947 provided for a National Security Council, which for a time consisted of the President, the Secretaries of State, Defense, Army, Navy, and Air Force, and the chairman of the National Security Resources Board. This Council, which in part operates through an executive secretary, attempts to coordinate the activities of the several departments which have to do with national security. Among other things, it includes the Central Intelligence Agency, which is expected to coordinate the intelligence activities of the several government departments and agencies in the interest of national security.

The need for coordination throughout the vast area of activities having to do with the conduct of foreign affairs is obvious. Even so, it is hard to bring about coordination among such diverse activities, organizations, and personnel as are involved. Attitudes toward policy inevitably change with points of view. Each interest, whether it be professionally diplomatic, military, or concerned predominantly with relief, tends to think of foreign policy first in terms of its own concern. It is not surprising, therefore, that government officials tend to disagree about the prospects and implications of the threat of war with the Soviet Union, the occupation of Germany and Japan, the control of foreign trade, the administration of aid to Europe and Asia, and so on. It is agreed that high officials in the several agencies should not be permitted to make over-all pronouncements on American foreign policy in the name of the United States without first clearing with some central source. On the other hand, to forbid every utterance unacceptable to some other agency would be virtually to close the mouths of many men in high office. While some efficient administrators clearly have no capacity for making or announcing public policy, the fact remains that men in high office are the principal source of information about government programs, and their silence means that the American people can learn what their government is doing only through such official hand-outs as are provided. We learn something from the attitudes of diplomats, military leaders, and economic administrators. It is perhaps less serious to have the utterances of these men embarrass us in foreign capitals than to be deprived of the light which comes from their occasional public remarks.

THE UNITED NATIONS

Aims and Organization. The United Nations, although a supra-national organization, is also to some extent an instrument of American foreign policy. Its Charter proclaims the purpose of the organization to be

> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
> 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
> 4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

The organization does not constitute a super-state. It is based on the principle of the sovereign equality of all its members. It is a kind of

coordinating organization to work out harmonious relations among nations which, without some kind of coordinating machinery, tend to go their several ways and to become involved in conflicts of all kinds. The basic organs are the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat.

The General Assembly. The largest organ within the United Nations is the General Assembly, in which each member country is represented by not more than five representatives. The functions of the General Assembly are primarily those of discussing the innumerable political, social, and economic problems which involve world welfare and which may give rise to world conflict. The following, for example, are some of the steps taken at the meeting of the General Assembly held in Paris in the autumn of 1948. It provided a Conciliation Commission for settlement of the dispute in Palestine. It impugned the giving of aid to Greek guerillas by certain Balkan states. It rejected a Russian proposal of a flat reduction by one-third of all armaments and called for study of the subject in detail. It urged continuing attempts to reach agreement for control of atomic weapons. It called on the great powers to compose their differences, speed a final settlement of the war, and conclude all peace settlements. It continued an interim committee, or Little Assembly as it was commonly called, which had been established a year earlier to handle problems when the General Assembly was not in session. It asked that applications of certain countries for membership in the United Nations be considered. It adopted a universal declaration of human rights. It adopted and presented for national signatures a convention outlawing genocide — "the destruction of national, ethnic, racial, or religious groups." It established a relief program for Palestinian refugees. It censured the Union of South Africa for not placing its mandated territory of Southwest Africa under UN trusteeship. It asked the powers administering trust territories to extend the educational facilities in their respective territories. It noted with approval progress toward establishing a permanent home for the United Nations in New York City. It continued the agency known as the United Nations Appeal for Children. It approved proposals aimed to promote economic development in under-developed countries. It took note of charges brought by Poland against certain nations for engaging in trade discrimination. It condemned profiteering in food and waste of food. It established an international training center in public administration. It referred to the International Court of Justice the question whether the United Nations had power to hold a government responsible for reparations for injury to an agent of the United Nations. It approved in principle the establishment of a United Nations Postal Administration. It elected certain nations to the Security Council. It took over certain functions of other international organizations and brought some such organizations into the United Nations. It filled vacancies on the International Court of Justice. It reminded the member states that the Charter

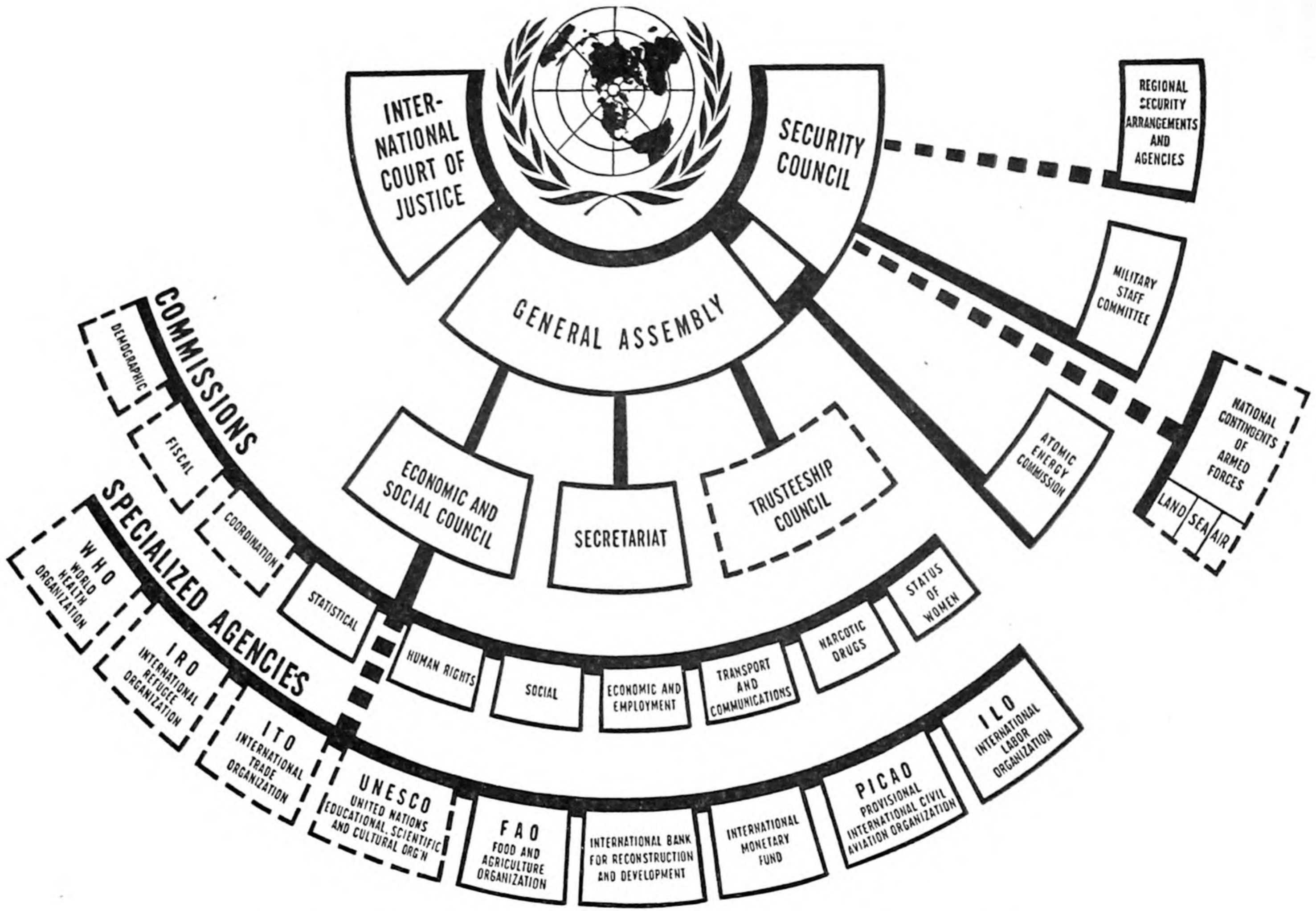


CHART SHOWING ORGANIZATION OF THE UNITED NATIONS

required them to register treaties and other international agreements with the United Nations. It took action on contributions to the budget of the United Nations. It provided that Spanish should be one of the working languages of the United Nations. It provided advisory service on problems of social welfare to governments requesting such aid. It approved a protocol establishing international control over new and dangerous synthetic narcotics.[29] So it was that, in spite of the fact that the General Assembly had no power to make and enforce law or to coerce member states, it provided a center for the formulation of world opinion and for taking steps which would broadly influence American foreign relations. It provided agreements which would become binding when entered into by individual states, and it brought about understandings which might have a great deal to do with shaping international conduct.

The Security Council. Such coercive powers over member states as is lodged in the United Nations, is placed by the Charter in the Security Council. This body consists of eleven members of the United Nations. The United States, Great Britain, the Soviet Union, France, and China — which, at the close of World War II, were regarded as the great powers of the world — are permanent members of the council. The General Assembly elects six other members for periods of two years only. On matters other than procedure, a unanimous vote of the permanent members is required. This provision is the source of the much-discussed veto power which has been widely exercised by the Soviet Union to defeat proposals supported by the other members. By this requirement of unanimity among the great powers, the Charter avoids the problem of coercive action against one of those powers. It in effect recognizes that the United Nations as organized is not strong enough to exercise coercive power against one of the stronger nations. The General Assembly may criticize one of the great powers and may stir up world opinion against it; and UN action brought to bear against a power, even in the Security Council, may prove embarrassing to such a member. There, however, the action of the United Nations ends.

To settle disputes among states, the Security Council may demand cessation of hostilities and may call upon member states to apply economic and political sanctions against offenders. The Charter provides for a military staff committee and for an international police force for use by the Security Council. No such force has yet been established. Member states may be called on to execute the purposes of the United Nations by providing military forces in particular agencies, as was the United States in the Korean war of 1950. Although it supplied troops and equipment, the United States took the position that it was not technically at war but was engaged in the exercise of police powers for the United Nations.

29. Digested from a summary in the *New York Times*, December 12, 1948. For a fuller statement of activities see President Truman's Fourth Annual Report under the United Nations Participations Act, House Doc. No. 598, 81st Cong., 2d sess. His letter transmitting the document appears in the *Congressional Record* (temporary daily edition), May 22, 1950, pp. 7517–18.

The effectiveness of the Security Council — and its value in terms of American foreign policy — is yet to be demonstrated. There is evidence that pressure from it is taken seriously by smaller states against whom it may be directed. Its potentialities have been obscured, however, because of the sharp division between the Soviet Union and the western powers which has led the former to veto important proposals for the control of atomic weapons, for the settlement of various international conflicts, and for the working out of postwar peace agreements. Although the veto has provided the procedural obstruction to action by the Security Council, the important consideration is not that the veto exists, but that there is a sharp rift between eastern and western powers. The flaw, in other words, is not in the machinery, but in the absence of that underlying basis for agreement which is necessary to the successful operation of any machinery.

Other Charter Agencies. The Charter of the United Nations provides for a number of agencies other than the General Assembly and the Security Council. Among them is the Economic and Social Council. This agency is expected to accumulate an infinite variety of information about economic and social problems which have more than local interest. It is concerned with the improvement of trade and production, the promotion of public health, the expansion of education, and innumerable other subjects. It does not wield power directly but is at once an advisory agency for the United Nations and a propaganda agency for the molding of world opinion. Under it have been organized other important agencies such as the Economic Commission for Europe which, through its own staff and its subcommittees, has done a great deal to provide for the better allocation of coal and shipping facilities and other scarce items to promote the reestablishmen of production in western Europe.[30] The broad concern of the Economic and Social Council with the rights of human beings everywhere is reflected by the declaration of human rights which was approved by the General Assembly in December, 1948.[31] It also seeks to harmonize and relate to the program of the United Nations a series of independent specialized international agencies which are not directly the product of the United Nations. Among these are the Food and Agriculture Organization, the International Bank for Reconstruction and Development, the International Labor Organization, the International Trade Organization, the United Nations Educational, Scientific, and Cultural Organization,[32] and the World Health Organization.

The International Court of Justice, as provided for in the United Nations Charter, is an agency modeled closely after the earlier Permanent Court of International Justice which had been set up in connection with the League of Nations and in which the United States had repeatedly refused to par-

30. For discussion see Michael L. Hoffman, "They Show that Nations can Cooperate," *New York Times Magazine,* September 12, 1948.

31. For the text of the Declaration of Human Rights, see the *New York Times,* December 7, 1948. See Hans Kelsen, "The Draft Declaration of Rights and Duties of States," *American Journal of International Law,* vol. 44 (April, 1950), pp. 259–76.

32. See Walter H. C. Laves, "Unesco and the Development of International Understanding," *Congressional Record,* March 18, 1949, vol. 95, part 13, pp. A1558–60.

ticipate. All members of the United Nations automatically become members of the new tribunal. The effectiveness of the court, as of many other agencies of the United Nations, seems likely to be greatly influenced by the extent of general harmony among the nations or by the lack of it. If the world proved ready for something genuinely approaching world government, the court might well develop into a judicial agency of tremendous international importance. Under existing circumstances, however, such development at an early date seems most unlikely.

The Organization of American States. The United Nations Charter also recognized the right to establish regional arrangements among nations in particular sections of the world for the settlement of local disputes. Although the Organization of American States is far older than the United Nations, dating back to a first meeting in 1890, it has become one of the recognized regional arrangements. Its functioning agency is the Pan American Union, within which there is a council of organization composed of one representative for each of the twenty-one member states.

The broad purpose of the Organization of American States is to provide machinery for the settlement of intra-American disputes which might otherwise result in war and to present a solid front against aggression from other parts of the world. The United States is, of course, by far the most powerful of the member states. It wields the most influence and incurs most of the expense of international cooperation. Because to some extent its power is resented and its influence feared while its favors are coveted, the problems of diplomacy are peculiarly difficult. The difficulties are enhanced by the fact that the effort to maintain stability in Latin-American governments often means giving support to totalitarian regimes. Doing so is hard to avoid, because so-called liberal movements in the western hemisphere, as well as in Europe and Asia, are often the instruments of communist influence. Because the United States is frequently juggled into supporting governments which are anything but democratic, it makes itself vulnerable to criticism by genuine liberals and by communists alike.

To sum up, the machinery of the federal government for the conduct of foreign affairs is not limited to a few specialized instruments but ramifies widely through the executive and legislative branches. Government agencies must cope with governmental problems wherever those problems are found and whether they are foreign or domestic. The line between foreign and domestic problems is becoming increasingly difficult to define. Almost everything we do at home has repercussions abroad, and little that happens abroad fails to have some discoverable effect within our borders. Our task, therefore, is to adapt the machinery of government to the solution of problems of foreign affairs which derive from the international leadership that is being forced upon us. The task is rendered all the more difficult because of the rival leadership of the Soviet Union and its incomparably different approach to world problems. We find it necessary, therefore, to mobilize

our domestic machinery, our machinery set up primarily for the conduct of foreign affairs, and our participation in international agencies such as the United Nations and related agencies so as to give aid to weaker countries and at the same time to combat a rival leadership which would stop only with establishment of the Soviet system throughout the entire world. Machinery is but the instrument of policy. Because throughout the world the impact of conflicting policies carries the dark threat of a third world war, the military arm of government in the United States now wields an influence in shaping programs which it has never before exercised in time of nominal peace. We must therefore shift our discussion to mechanisms and policies which are involved in preparations for national defense or war.

References

James F. Byrnes, *Speaking Frankly* (Harpers, 1947).
J. Rives Childs, *American Foreign Service* (Holt, 1948).
Winston Churchill, *The Grand Alliance* (Houghton Mifflin, 1950).
Royden J. Dangerfield, *In Defense of the Senate* (University of Oklahoma Press, 1933).
Eleanor E. Dennison, *The Senate Foreign Relations Committee* (Stanford University Press, 1942).
Clyde Eagleton, *International Government* (Ronald, rev. ed., 1948).
Charles G. Fenwick, *The Inter-American Regional System* (McMullen, 1949).
Carl J. Friedrich, *Inevitable Peace* (Harvard University Press, 1948)
E. O. Guerrant, *Roosevelt's Good Neighbor Policy* (University of New Mexico Press, 1950).
The Memoirs of Cordell Hull (Macmillan, 1948).
Benjamin A. Javits, *Peace by Investment* (Funk & Wagnalls, 1950).
Philip C. Jessup, *A Modern Law of Nations* (Macmillan, 1948).
Sherman Kent, *Strategic Intelligence for American World Policy* (Princeton University Press, 1949).
Arthur Bliss Lane, *I Saw Poland Betrayed* (Bobbs-Merrill, 1948).
James L. McCamy, *The Administration of American Foreign Affairs* (Knopf, 1950).
Harold George Nicolson, *Diplomacy* (Harcourt, Brace, 1939).
Elmer Plischke, *Conduct of American Diplomacy* (Van Nostrand, 1950).
Pitman B. Potter, *An Introduction to the Study of International Organization* (Appleton-Century-Crofts, 5th ed., 1948).
Walter Bedell Smith, *My Three Years in Moscow* (Lippincott, 1950).
Murray S. Stedman, Jr., *Exporting Arms: The Federal Arms Exports Administration 1935–1945* (King's Crown Press, 1947).
Graham Stuart, *American Diplomatic and Consular Practice* (Appleton-Century, 1936).
———, *The Department of State, a History of its Organization Procedure and Personnel* (Macmillan, 1949).
Twentieth Century Fund, *Rebuilding the World Economy: America's Role in Foreign Trade and Investment* (Twentieth Century Fund, 1947).
Richard Van Alstyne, *American Diplomacy in Action* (Stanford University Press, rev. ed., 1947).
Barbara Ward, *The West at Bay* (Norton, 1948)
Albert C. F. Westphal, *The House Committee on Foreign Affairs* (Columbia University Press, 1942).

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National Defense

So acute are current crises in international relations that few people question our need for elaborate machinery, well trained personnel, and plentiful equipment for national defense. We have abandoned the belief, widely held in the 1930's, that involvement in war could be avoided primarily by strict observance of neutrality and surrender of rights of trade and travel in areas of conflict between other nations. So completely have we discarded these isolationist assumptions of the neutrality period that it is hard to recall how dominant they were less than two decades back. Yet, to understand our problems and our machinery for national defense, it must be remembered that those assumptions have been far more characteristic of American experience than is, for example, the Truman doctrine that the United States will feel free and perhaps obligated to defend nations anywhere in the world which are the victims of totalitarian pressure. In military matters as in international relations generally, American thinking has until recently been conditioned by our isolation from the immediate influence of other powerful states, by the vastness of our own territory, and by the high degree of our economic self-sufficiency. We have not been intrinsically a pacific people. We have been ready to use force when our interests required it — as the British, the Mexicans, and the Spanish learned, and more recently the Germans and the Japanese. For the most part, however, our national interests have been better served by other means than war, and our military planning has been done accordingly.

Another fact is important. Because the United States was isolated and did not have to fight frequent wars for survival — because it could regard the state of war as the exception and peace as the rule — it could afford to leave the military in a position of low estate. It could afford to maintain the tradition inherited from Great Britain that military power must always be kept in strict subjection to civil power. If this assumption has been seriously undermined by events since 1941, the fact remains that our military planning and activities for more than a century and a half have been based on it, and that problems of military organization and influence even today can be understood only by keeping the past in mind. The military arm, like the hangman's noose, may have to be used in any society, but in ours neither

has been looked upon with favor. In the United States, by contrast with Great Britain, Germany, and various other countries, the professional soldier does not stand high in the social scale. Neither, until recent years, has he in his professional capacity exerted any important influence on public policy. But at a time when military expenditures run to $15 billion a year — the exact amount varying not only with appropriation totals but with the placement of dividing lines between defense and non-defense appropriations — all this is changed. Today high ranking military men, chosen to perform only in military fields, have been given such power as to permit them to play a major part in shaping national policy. We are therefore faced suddenly with the need to re-educate the narrow, rigid, and highly regimented military profession to perform broad public responsibilities.

THE CONSTITUTIONAL PATTERN

Congress. Constitutional provisions dealing with national defense and war, like those dealing with foreign affairs in general, are scattered through many sections of the Constitution. The powers conferred are divided between Congress and the President. Congress is authorized to raise and support armies, with the cautious restriction that "no appropriation of money to that use shall be for a longer term than two years." It is authorized to provide and maintain a navy. It is authorized to make rules for the government and regulation of the land and naval forces. In early years when the militia of the several states were expected to make up an important part of our fighting forces, those constitutional provisions were important which authorized Congress to provide for calling the militia into the federal service and for organizing armies and disciplining the militia. Congress also has the power of formally declaring war, although the power may be little more than an empty gesture if war is forced upon us by a foreign power or if the action of the executive branch of the government leaves Congress no option but to declare war at the President's request. The power to provide the necessary funds, whether by taxation or borrowing, and the power to make appropriations for war, also belong to Congress. For war as for other matters, Congress is authorized to make any laws which may be necessary and proper to carry these powers into execution.

Congressional Committees. Powerful congressional committees shape the defense program of Congress. Each house has a Committee on the Armed Services, the successor to earlier separate committees dealing with the War and Navy Departments. Almost more than in any other field, the Committees on the Armed Services assume a proprietary attitude toward their charge. They try to act as "watchdog" committees over the services, and they are always ready to rush to the defense of one or another of them. This proprietary watchfulness has particularly characterized the chairman of the thirty-six man Committee on the Armed Services in the House, Representative Carl Vinson. Mr. Vinson has associated closely with leaders

particularly of the Navy and the Air Force, and although he is not a member of the Committee on Appropriations, has intervened in legislative battles to insure generous appropriations for particular services. The military wields a powerful lobby, and makes itself effective partly because of the close relations which it establishes with the committees which frame legislation. Here as in other important fields appropriation committees, or subcommittees, play a large part in shaping government programs. There is usually effective liaison between the Committees on the Armed Forces and the appropriations subcommittees with jurisdiction in military matters.

The President. The specific provision of the Constitution dealing with the war powers of the President is that he "shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States." The meaning of this provision is far from clear. Some have thought that it was drafted with the thought of George Washington as President and on the assumption that in time of war the President would actually take command of troops in the field. Others, surveying American history in the light of the fact that very few Presidents have had the capacity for direct military leadership, have assumed that the Constitution conferred not direct military command but merely the right of over-all supervision and direction. Some members of Congress have objected to this interpretation, however, contending that it gives the President wartime jurisdiction which rightfully belongs to Congress. The division of power in time of war has turned not so much on precise interpretation of constitutional phrases as on estimates of the best way to win military victories.

In any event, the President exerts an influence over our military program. He cannot turn pacifists into militarists or vice versa, but if he has a normal amount of influence with the people and with Congress he can do a great deal to determine trends. Both Roosevelts in the presidency succeeded in doing a great deal to build up the Navy. Wilson and Franklin D. Roosevelt helped secure military expansion in anticipation of war. President Truman helped shape our policy of regional defense, particularly in supporting the Atlantic Pact and the regional military program which called for vast military appropriations to build up the defenses of allied nations.

Rivalry with Congress. Congress, it is true, does not always willingly accept presidential leadership. If some sections of the military establishment side with the President and others with Congress, the outcome may be unpredictable. As discussed in Chapter 23, Congress in 1948 yielded to pressure from the air force and made appropriations for an air establishment greater than those desired by the President. The President signed the bill but, acting through the Bureau of the Budget, withheld the funds for building the air force beyond his own estimate of need, to the wrath of

Representative Vinson and other members of Congress. On this matter an appropriations subcommittee in 1950 severely grilled Secretary of Defense Johnson, who had collaborated with the President in restricting expenditure on the Air Force. The Secretary pleaded his own obligation to obey the President and argued that the President, as Commander-in-Chief, had the constitutional power to impound the funds. Although noting that Congress itself had been divided and that the President had consulted members on both sides, Secretary Johnson asserted that

> There are certain duties and responsibilities of the President of the United States and the Commander in Chief. Operating in those fields he is inherently invested with certain powers. Any assumption as [to] the doing of those things which would conclude that he had not acted for the best interest of the country in the over-all picture without a sound and reasonable determination might raise questions such as you suggest, but as long as he moves as Harry Truman has moved, in my opinion, in the area above what he thinks are the necessary items for the defense or security — and you do not challenge and cannot challenge that defense and security — it is within the inherent authority of the President and Commander-in-Chief to so act.[1]

The committee, however, continued to voice the belief that the President had violated congressional prerogatives in preventing expenditure of funds which Congress had appropriated.

On other phases of the subject, as well as the control of appropriations, the President and Congress often find themselves at odds. They have differing concepts of defensive needs in different parts of the world, of the need for conscription to raise manpower, of the need for scientific aids and training facilities, and so on. On these subjects Congress itself is usually divided, as the several branches of the military may be also, and the people are likely to be both divided and inadequately informed. The President's influence turns on both the combination of forces and his own political skill.

The Federal Courts. The judiciary plays a relatively small part in settling the issues of national defense and war. There is an ancient maxim to the effect that "In time of war the laws are silent." Our peacetime judiciary plays no part in the direct operations of our military machine. Military justice falls into a special category — which is discussed farther along. The regular courts come into play on the edges of military jurisdiction. The Constitution limits expansion of military jurisdiction, providing, for example, that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." The writ of *habeas corpus* is a device to prevent executive officers from throwing into prison and holding without trial men whom they dislike or fear or whom they suspect of misconduct. The person claiming to be illegally held applies to a court for a writ of *habeas corpus*. The court

1. *Department of Defense Appropriations for 1951*, Hearings, House Committee on Appropriations, 81st Cong., 2d. sess., p. 56.

directs that the prisoner be brought before it to determine the legality of his detention. If the detention proves to be illegal, the court orders his release. The device of wholesale detention of suspected persons may be extremely useful in time of war where there is no opportunity to sift suspects carefully. For that reason, the Constitution permits suspension of the privilege of the writ of *habeas corpus* in cases of rebellion or invasion.[2]

The Constitution restricts court action by defining treason against the United States narrowly as levying war or giving aid and comfort to the country's enemies. It forbids convictions for treason unless on the testimony of two witnesses to the same overt act or on confession in open court. Likewise it restricts punishment for treason by declaring that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted." In other words, even the heirs of traitors may not be punished for the crimes of their ancestors.

The service of courts is required to interpret federal statutes providing for national defense and war. Whether particular individuals are subject to conscription, under what terms property may be taken for use by the government, who may fix prices and establish priorities of right to scarce materials — all these and many other questions are decided in the courts. These questions, be it noted however, are a bit offside from the conduct of war itself. With the conduct of war the courts have little to do. As Justice Jackson has said,

> The armed services must protect a society, not merely its Constitution. . . . [A military commander] issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.[3]

Wars are fought not with a nice judgment on matters of constitutionality but so that constitutional regimes may survive and courts thereafter can shield the rights of the people. The arrangement may work well if war comes but infrequently. If a nation is compelled permanently to operate as an armed camp, civilized protections may wither away.

THE DEPARTMENT OF DEFENSE

Although total war calls for the use of all resources, and preparation for it calls for mobilization far beyond the military, we have found it worth while to concentrate military affairs in one gigantic executive department called the Department of Defense. This central department is relatively new. It was created by the National Security Act of 1947 as the National Military Establishment, and in 1949 its powers were expanded and its name was changed to Department of Defense. This executive department incorporates three subordinate departments, those of the Army, the Navy, and the Air Force, which, even though headed by civilian Secretaries, are usually called military departments to distinguish them from the Depart-

2. See *Ex parte Milligan*, 4 Wallace 2 (1866).
3. *Korematsu* v. *United States*, 323 U.S. 214, 244 (1945).

ment of Defense as a whole which is classified as an executive department and is represented in the President's Cabinet.

The Problem of Unification. Until 1947 we had two separate executive departments in the defense field, the War Department and the Navy Department. Intense rivalry existed between them, and more particularly between the Army and the Navy which they represented. Armed service groups aggressive enough to wage wars may be expected to develop rivalries and antagonisms. When rivalry prevents effective cooperation to the extent of endangering national defense, however, it has to be curbed. Lack of coordination between the War and Navy Departments during World War I convinced many people that dividing the armed forces between two independent departments was a luxury which the country could no longer afford. In recommending reorganization of the executive branch after the war President Harding proposed merging the two departments into a single Department of Defense, but both were hostile to the merger and succeeded in preventing it.

Part of the disaster of the Japanese attack on Pearl Harbor on December 7, 1941, was attributed to lack of cooperation between the Army and the Navy. Local commanders in both services were singularly unaware that cooperative defense of the United States was more important than maintaining haughty aloofness between Army and Navy. Furthermore, the beginnings of war in the air demonstrated the inadequacy of our Air Force. The military disasters of 1941 and 1942 shocked the people and the military services themselves into an awareness that temporary unifying machinery had to be established to coordinate the Army and Navy and improve the use of air power. Such machinery worked well enough so that after the war far-sighted leaders insisted that permanent machinery be established to preserve this unity. Within the armed forces, army groups took the lead in the move for permanent unification. The defenders of air power insisted that, whatever the scheme of unification adopted, air power should no longer be subordinated to either of the other services. The Navy held back, apparently fearing Army domination, and contended that it must still have control of substantial air forces, including those of aircraft carriers. In 1947, James Forrestal, then Secretary of the Navy, summarized the recent history of the unification movement as follows:

> The army started full tilt, as far back as 1942, to secure a physical merger of the army and navy. The air forces have been campaigning for greater independence for over 20 years. The navy consistently has held to the belief that it could do its work best as a separate service.[4]

Under pressure the War and Navy Departments and the interests representing the air forces conferred at great length on a unification measure and agreed upon many compromises, some of which tended considerably to weaken the extent of unification. Even then conservative Navy interests

4. *National Security Act of 1947*, Hearings, House Committee on Expenditures in the Executive Departments, 80th Cong., 1st sess., on H.R. 2319, p. 103.

held back. The following statement by a retired Rear Admiral illustrates the point.

> It is a little frightening when we read such statements as that by General Palmer in 1946 when he said that the Army wanted the Secretary of Defense "to coordinate Air, Army, Navy Intelligence, Research, Production, Supply, Manpower, and Diplomacy as the General Staff Coordinates the War Department."
>
> A Secretary of Defense dominated by the Army becomes in fact a single Chief of Staff. He becomes a military dictator particularly if selective service is put into effect under control of the General Staff. He cannot be impeached and it is doubtful that he could be court-martialed. He is in the position of an Army man commanding the Navy or vice versa.[5]

By contrast, the need for unification was well phrased by General Dwight D. Eisenhower, who had returned from his western European command of the Allied Expeditionary Forces of the United Nations to become Chief of Staff of the Army:

> When I returned from Europe in November 1945, I appeared before a committee of the Congress to express my convictions concerning appropriate over-all organization of the security forces of America.
>
> Those convictions were frankly and almost exclusively based on 3½ years of field experience in the war, an experience that comprehended the employment of all branches of the armed services in island and in continental campaigns.
>
> As a result of that experience I came to the conclusion that the mere existence of unified command in the field — without slightest reference to the individual exercising such command — is a vital factor in speedy and decisive victory in war.
>
> I believed then, and now believe as firmly, that if we had attempted to fight the late war under the same theories and practices of command that applied in Europe in 1914–18, attainment of victory might have been long delayed, with untold and wasteful losses in men and secondarily in money and resources, and at the worst could have lost us the war.
>
> During those long months in Europe, I and my associates came to understand that in a major conflict there was no such thing as a separate land, sea, or air war. Single purpose and direction and careful balancing of forces were necessary. We therefore came to believe that in the broader field of preparation and production of forces, in planning and in control of operations, a closely knitted headquarters in Washington would add to national efficiency and economy.
>
> All agreed that single command in the field was essential; for my part this incontestable truth applied equally to the Washington management from which the orders for the field commander must come.
>
> Upon returning to America I found that the unanimity of agreement I had encountered on this point in Europe did not prevail here. Moreover, and most disappointingly, I found that the subject had become one of interservice argument. It appeared that all men wearing one color of uniform had one conviction while those wearing another color developed opinions to the exact contrary.
>
> My next astonishing discovery was that these conflicting opinions had developed a controversy of which the intensity seemed to be out of pro-

5. Testimony of Rear Admiral Ellis M. Zacharias, *ibid.*, p. 487.

portion to anything warranted by mere difference in intellectual conclusion. Because of this I explored this subject to the limits of my ability.

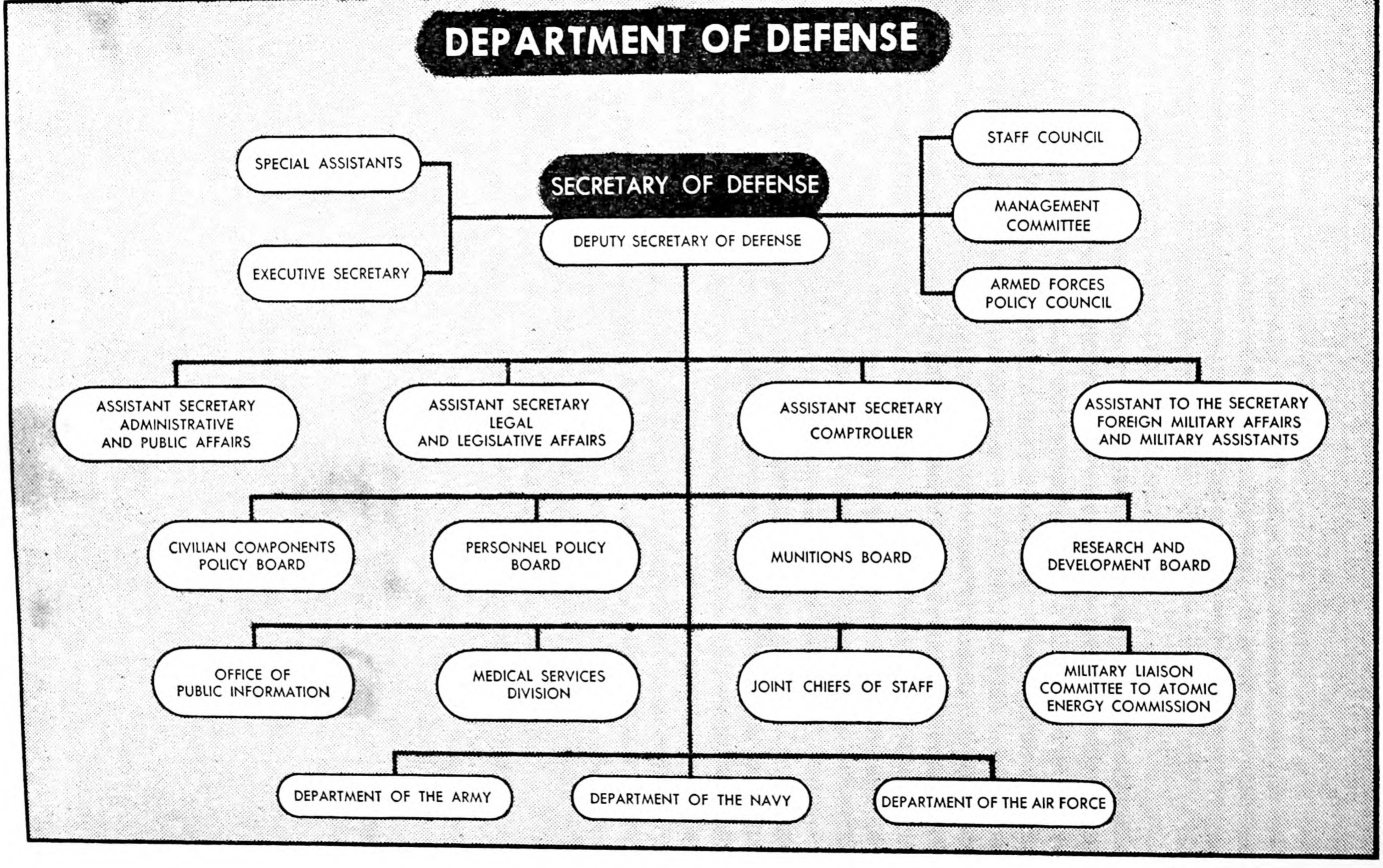
In every included problem within the over-all subject I found an amazing variety of opinion. Regardless of the unquestioned integrity of the principal figures involved, it appeared that earnest and disinterested conclusions were, when attempt was made to translate them into the field of practical agreement, frequently colored by fears, by prejudice, and in many instances by traditional jealousies.[6]

By the National Security Act of 1947 as amended in 1949, Congress established the Department of Defense with three military departments as subordinate agencies. The Department of Defense is expected to coordinate policies and programs for the three fields, to eliminate duplication in the purchase of supplies and in other matters, and to supervise and coordinate the budget estimates of the three services. Since 1947 stormy battles have raged among the services and between them and the Secretary of Defense over matters of control. Each service seems convinced that the welfare of the United States requires its own expansion, if necessary at the expense of the others. Each has its own traditions of operation and its own conceptions of the best way to wage war. Hence each finds ways to go over the head of the Secretary of Defense to the President and over the heads of the Secretary and the President to Congress. The struggle virtually cost the life of James Forrestal, former Secretary of the Navy and the first Secretary of Defense. The somewhat tougher-minded Louis Johnson who succeeded him likewise endured tremendous buffeting as military interests, private lobbies, and congressional groups pressed for changes in the military program as worked out under the direction of himself and the President. The Hoover Commission aided unification by its support and its criticism of the limitations of the 1947 measure, and helped secure the strengthening statute of 1949. Even then, however, the Secretaries of the three military departments retained their anomalous titles instead of being reduced to Under Secretaries as the commission recommended.[7] The subordinate departments probably have even yet a great deal more independence than they should have.

Departmental Organization. Because it is partly an independent department and partly a kind of holding company for the three military departments, the organization of the Department of Defense is hard to describe. The position of Secretary of Defense is comparable to those of the other executive department heads. His immediate subordinate, comparable to Under Secretaries in other departments, is called Deputy Secretary of Defense. There are three Assistant Secretaries, one for administration and public affairs, another for legal and legislative affairs, and a third with the functions of comptroller. All these and their immediate subordinates are civilians, and are expected to maintain civil control over the military. Each

6. *Ibid.*, pp. 271–72.
7. *The National Security Organization*, House Doc., No. 86, 81st Cong., 1st sess., p. 16.

DEPARTMENT OF DEFENSE


SPECIAL ASSISTANTS
EXECUTIVE SECRETARY
SECRETARY OF DEFENSE
DEPUTY SECRETARY OF DEFENSE
STAFF COUNCIL
MANAGEMENT COMMITTEE
ARMED FORCES POLICY COUNCIL
ASSISTANT SECRETARY ADMINISTRATIVE AND PUBLIC AFFAIRS
ASSISTANT SECRETARY LEGAL AND LEGISLATIVE AFFAIRS
ASSISTANT SECRETARY COMPTROLLER
ASSISTANT TO THE SECRETARY FOREIGN MILITARY AFFAIRS AND MILITARY ASSISTANTS
CIVILIAN COMPONENTS POLICY BOARD
PERSONNEL POLICY BOARD
MUNITIONS BOARD
RESEARCH AND DEVELOPMENT BOARD
OFFICE OF PUBLIC INFORMATION
MEDICAL SERVICES DIVISION
JOINT CHIEFS OF STAFF
MILITARY LIAISON COMMITTEE TO ATOMIC ENERGY COMMISSION
DEPARTMENT OF THE ARMY
DEPARTMENT OF THE NAVY
DEPARTMENT OF THE AIR FORCE

of the three so-called military departments also has a Secretary, an Under Secretary, and one or more Assistant Secretaries, all of whom are likewise civilians. Thus the vast military organization is at least nominally subject to civilian direction, with military control in each military department under a Chief of Staff — who in the Department of the Navy is called Chief of Naval Operations.

With all the separateness of the three military departments, there is evidence of gradual merging in the combination of formerly separated functions under the single jurisdiction of the Department of Defense. That department has its own Office of Information. Although three separate medical services are still maintained, it has an Office of Medical Services. It has a Personnel Policy Board. A Munitions Board has replaced formerly separate organizations. There is a Military Liaison Committee to the Atomic Energy Commission. A Research and Development Board centralizes the increasingly important task of turning scientific discoveries to military use. The Joint Chiefs of Staff, consisting of the Chiefs of Staff of the three military departments, are brought together in a single organization under the chairmanship of a fourth military man, who as of 1950 was General Omar N. Bradley. An Armed Forces Policy Council consists of the Secretary and Deputy Secretary of Defense, the Secretaries of the three military departments, and the four members of the Joint Chiefs of Staff. These organizations indicate and symbolize the growing unity of function in the Department of Defense.

THE MILITARY SERVICES — THE ARMY

The Army Tradition. The principal instruments of military power are the Army, the Navy, and the Air Force, with the Marine Corps acting in conjunction with the Navy, and the Coast Guard also as far as it is used in defense and combat. Of these the Army is the oldest. Constitutional provision for it was made in the light of experience with the organization which, under the leadership of George Washington, won the Revolutionary War. The War Department, now the Department of the Army, was organized by the first Congress in 1789. Our predominantly Anglo-Saxon culture, however, was not a military culture. Our English forbears had long sensed the dangers of a powerful military organization and the need to keep the military strictly subordinate to civil government. It has been said that the military policy of the United States at the beginning of the present century "had as its background a traditional fear of the army as a threat to liberty."[8] The military profession in the United States has never had the same prestige as the practice of law or medicine or the pursuit of many other recognized callings. Men in military uniform have worked largely in isolation from the rest of the population without even that merging at officer levels which has somewhat characterized English and other societies where the so-called upper classes have provided large numbers of professional officers.

8. Pendleton Herring, *The Impact of War* (New York: Farrar, 1941), p. 43.

It may be partly for these reasons that the United States has been traditionally unprepared for war. Congress, in recognition of public sentiment, has been slow in making appropriations. Only a small percentage of our ablest men have chosen military careers. The hierarchy of military officers has been clogged with dead wood. For more than a century after the Revolutionary War, the Army saw too little active service to keep it in trim for effective action. Indian wars were sporadic. The War of 1812 was an inglorious affair, demonstrating particularly the military ineptness of the poorly trained state militia which were called into the federal service. The Mexican War provided no real trial of strength. The Civil War demonstrated an outstanding lack of military capacity, particularly in the North, until officers and men had been hardened in the crucible of war. The Spanish-American War offered no great challenge. World War I came to an end before we were ready for military action in any sense commensurate with our economic strength. Even in World War II, where our final military achievements were tremendous, we were cushioned by our fighting allies while we were getting ready.

Army Officers. Although there has been some opportunity to rise from the ranks, the need for competent officers has required specialized officer training. The United States Military Academy at West Point, founded to meet that need, provides a four year course of intensive education and training. In time of war or threat of war, its facilities are greatly expanded. There is always the risk that the normal training given will be too conventional and unimaginative and that emergency training will be inadequate. Until recently, the conventionality of routine training derived in part from congressional reluctance to appropriate funds to permit adequate experience with modern weapons and in part from the essential conservatism of the military caste. Even more than lawyers, military men are noted for their preoccupation with the way in which things have been done in the past. A great deal of their training consists of the study of military tactics of past wars. Our own military men and others are frequently criticized as preparing for the last war, not for the next.

This over-emphasis on tradition is a threatening defect of the profession generally and a product of an officer system in which promotion is based on seniority and conformity. A major attraction of a military career is assurance of employment and ultimate retirement with adequate pensions and free medical services and hospitalization for the officer and his family. While no doubt some officers are retired before their usefulness is over, it may well be that the country would suffer more from their continued employment than from the cost of their retirement. Military mistakes are likely to be dangerous and costly. Unless his offense is serious enough to justify a court martial, an offending officer cannot be dismissed for inefficiency, as can employees in business and in other professions. Liberal retirement provisions, therefore, may reflect sound public policy. In spite of the retirement policy now in effect, the Surgeon General of the Army in

1948 expressed the opinion that twenty percent of our Army Officers should be retired. When asked to explain his position, he restated it as follows:

> I think that perhaps between 10 and 20 per cent of the officers in the Regular Army should now be retired. Our examining boards, in my opinion, don't find all disabilities which are permanent. Lots of disabilities are hard to find, particularly if they have to do with arteriosclerosis in the brain. It is hard to demonstrate that you have a disability.[9]

Military Manpower. Until recent years the United States has taken pride in the fact that its army was made up of volunteers. Americans have scoffed at the conscript armies of other countries, believing that conscripted soldiers would in general never be good fighting men. During the War of 1812 a shortage of military manpower led Congress to consider enactment of a conscription law, but the measure was never passed. A conscription act was passed during the Civil War, but drafted men could avoid service by paying a specified sum to hire a substitute. Only with World War I, when the experience of Great Britain demonstrated the cost of unplanned use of manpower by a volunteer system, did Congress enact a broad conscription measure immediately upon our entrance into the war. Such a measure places, or can place, all the manpower at the disposition of the government so that the best possible use of all types of ability can be planned. Although a fragment of the traditional stigma of conscription may still attach to the drafted soldier, it has in large part disappeared with recognition of the needs of the government under conditions of total warfare.

In 1940, for the first time in American history, Congress provided for conscription in time of peace. Military manpower in World War II was selected largely by conscription. In 1948, when the volunteer system failed to provide sufficient manpower to expand the army in the face of deteriorating relations with the Soviet Union, Congress again reluctantly resorted to conscription as an alternative to universal military training.

Army Organization. The highest ranking military officer in the Department of the Army is the Chief of Staff. The position is one of great power and prestige. It has been held in recent years by such outstanding military leaders as George C. Marshall, Dwight D. Eisenhower, and Omar N. Bradley. Except as now supplanted by the chairman of the Joint Chiefs, the Chief of Staff is the principal army adviser to the President, to the Secretary of Defense, and to the Secretary of the Army. He has command of all components of the Army at home and abroad and is responsible for coordinating the various parts and services of the Army which have highly technical forms of organization.

Operating under the direction of the Chief of Staff is the Army Staff, a board of Army officers which is responsible for the development and oper-

9. *Investigation of Disability Retirement Systems in the Army Services*, Hearings, House Armed Services Committee, 80th Cong., 2d. sess., p. 67.

ation of the various Army components. The Army Staff has been organized in five divisions as follows: Personnel and Administration, Intelligence, Organization and Training, Logistics, and Plans and Operations. The General Staff is aided, in turn, by an advisory body known as the Special Staff which comprises eight organizations, the Public Information Division, the Legislative and Liaison Division, the Troop Information and Education Division, the National Guard Bureau, the Office of the Executive for Reserve and R.O.T.C. Affairs, the Office of the Inspector General, and the Historical Division.

Various departmental organizations are listed as Administrative Services. The Adjutant General is responsible for a great mass of administrative procedures connected with personnel. The Judge Advocate General is the chief law officer of the department. He is responsible for supervising the system of military justice and for providing legal advice and services throughout the department. The Chief of Chaplains is concerned with the moral and religious welfare of military personnel. The Provost Marshal General is responsible for establishment and training of the corps of Military Police. The Chief of Special Services is charged with various activities calculated to maintain the mental and physical stamina of military personnel. The functions of a group of technical services are indicated by their titles: Finance Department, Chemical Corps, Medical Department, Corps of Engineers, Quartermaster Corps, Signal Corps, Ordnance Department, and Transportation Corps.

THE NAVY

Growth and Development. The growth of our Navy to become the foremost in the world followed a slow, uncertain course. The first Congress under the Constitution placed jurisdiction over naval affairs in the War Department. The construction and use of fighting ships involves enormously different problems from those of building and using an army, and in 1798, in the face of the threat of war with France, Congress authorized establishment of the Navy Department. The fear of a standing army felt by the founding fathers did not extend to naval power. Whereas a powerful army was regarded as a menace to civil liberty, the Navy was looked upon as an instrument for defense against foreign powers and not as one which might be turned upon the people whom it was intended to serve.[10] Such opposition as there was to a powerful navy was based less on fear of it than on the tremendous cost. Since the United States had no predatory designs upon lands across the seas and could quickly call up a civilian army for defense at home, it was widely assumed that the maintenance of a strong navy was but a wasteful luxury.

With the Navy as with the Army, the lack of sustained public interest

10. On this point, see William B. Prendergast, "The Navy and Civil Liberty," *United States Naval Institute Proceedings*, vol. 74 (October, 1948), pp. 1263–67.

produced unevenness of policy and involvements in local politics. As the location of Army posts throughout the United States became a matter for political manipulation in Congress, so the location of Naval bases and the construction of ships became political plums for politicians from coastal states. Naval exploits during the Spanish-American War helped to capture national attention. Theodore Roosevelt as President retained that attention by putting the navy on parade and sending it on a tour around the world.

World War I and the problem of landing and maintaining an army overseas demonstrated the need of a powerful navy if the United States was to participate in modern wars and play a leading part as a first class power. The construction program undertaken during the war brought the United States to the fore as a naval power. The attempt to return to "normalcy," however, and the belief that world peace could be maintained by international disarmament programs, led to abandonment of the construction program. It was in part because of the interest of President Franklin Roosevelt in the Navy and in part the desire to provide work for the unemployed and to restimulate industry, that the rebuilding of the Navy was begun during the New Deal period. War clouds over Europe speeded construction even as the United States was seeking to avoid involvement by enacting a program of neutrality. The immediate prewar years and the period of World War II saw the United States crowd to the fore, even to the point of supplanting Great Britain as mistress of the seas.

Naval Officers. In his annual report for 1947, the Secretary of the Navy listed the sources of new Naval officers as directly from civilian life, the Naval Reserve Officers' Training Corps, the United States Naval Academy, the Naval Aviation Cadet Program, and the services.[11] The United States Naval Academy at Annapolis has long been the cradle of Naval traditions. It produces a Naval aristocracy comparable to the Army aristocracy which comes from the United States Military Academy at West Point. Though by no means all Naval officers are trained there, the attitudes engendered at Annapolis tend to spread through Naval officer groups wherever found. Army and Navy traditions are the cause of much of the wasteful interservice conflict for which both services have been so sharply criticized in recent years. Naval, like Army, education has been criticized for its preoccupation with wars and battles of the past rather than with the conflicts of the future, which are likely to follow different patterns. Former Secretary of War Stimson is quoted as referring to admirals as "high priests of a dim religious world in which Neptune was God, Mahan his prophet, and the United States Navy the only true Church."[12] This emphasis is said to have been modified, however, in the Naval War College at Newport, Rhode Island, for advanced training of Naval officers. There attention is being

11. *Annual Report of the Secretary of the Navy, 1947*, p. 28.
12. Henry L. Stimson and McGeorge Bundy, *On Active Service in Peace and War* (New York: Harper, 1948), p. 506.

given to the weapons of the future as well as the ships and tactics of the past, and to changed conditions which will affect the patterns of future wars.[13]

Naval Manpower. Whereas the Army has at various times had to lower its personnel standards to secure adequate enlistments, the Navy has usually been able to attract all the men of high caliber it needed. It has taken pride in the quality of its personnel and in its ability to compete effectively with Army enlistment. During World War I, when Congress resorted to conscription to secure Army manpower, the Navy was able to continue operations by means of voluntary enlistment — which, it is true, was encouraged by the desire to avoid the stigma attached to conscription. During World War II, however, control was so broad that Navy as well as Army personnel were provided largely through a selective system, although to some degree with individual choice of branch of service. While in time of peace the Navy may continue to secure adequate manpower through enlistment, it seems clear that in any future war the allocation will be even more carefully planned than in World War II. It is far more important that able men be placed where they are most needed than that they have the illusion of freedom of choice.

The Marine Corps. What has been said above of Naval manpower is true also for the most part of the Marine Corps. Whereas sailors operate the fighting ships of the United States, the Marine Corps constitutes a fighting arm which the Navy maintains for land expeditions. The Marine Corps also has a spirited tradition which tends to attract adventurous, able-bodied young men. Its functions tend to overlap those of the Army, however, and rivalry and jurisdictional conflicts result.

THE AIR FORCE

Air Force Tradition. Although armies and navies have existed throughout recorded history, air forces are the product of the twentieth century. Airplanes played a relatively minor part in World War I. It was not until 1927 that Charles A. Lindbergh made the first successful flight across the Atlantic Ocean. Very quickly, however, a small group of military men began to envisage the possibility of a complete change in the conduct of warfare, with huge fleets of bombers and fighters and the virtual abandonment of armies and navies as traditionally known. Most Army officers scoffed at what they regarded as the fevered imaginations of youth, and yielded only slowly and reluctantly to pressure for the building up of air forces. Moreover, the rapid improvement of airplanes, the consequent obsolescence of planes on hand, and the cost of what was, for a considerable time, virtually hand production as distinguished from mass production in other fields, stood in the way of expansion.

13. Hanson Baldwin, "Naval Course Broader," *New York Times*, February 2, 1948.

World War II brought development and expansion of the use of aircraft which otherwise might well have required many decades. The destruction wrought by German planes demonstrated the necessity for fighter defense. Our inability to invade continental Europe immediately after our entrance into the war, and the inability of our Navy to do effective damage to the enemy ashore, necessitated the development of long-range bombing operations. Fighting against submarines and against ship-borne Japanese aircraft necessitated the building of aircraft carriers. The need for rapid transport called for planes of still other kinds. In the face of the tremendous need, American industry developed techniques of mass producing airplanes and of working new improvements into mass produced equipment.

The air forces of the United Nations did not fulfill the predictions of air enthusiasts by winning the war virtually overnight by obliterating enemy cities, industries, and transportation. They did, however, play a tremendous part, and it was a matter of no small comfort to the United Nations invaders of western Europe that the air cover was their own and not the enemy's. Naval aircraft played a considerable part in the virtual destruction of the Japanese Navy and paved the way for ultimate Japanese defeat. It is not surprising, therefore, that after the war the demands of Air Force enthusiasts brought about the establishment of a new department for development and management of the new instrument — or so much of it, at any rate, as had been under Army jurisdiction.

Air Force Officers and Personnel. Although rivalry quickly developed between Air Force personnel and those in the more conventional military and naval services, much of the early leadership had been educated at West Point and Annapolis. Shortly after the Department of the Air Force was created, the Secretary of the Air Force announced the hope that two-thirds of the future pilots could be secured from the two academies and one-third from the National Guard, college flying units, and the enlisted ranks of the armed services.[14] Approximately a year later, however, the Secretary of Defense, while authorizing the use of West Point and Annapolis training facilities for Air Force personnel, looked forward to the establishment of an Air Force academy.[15] In spite of growing interest, no such academy has yet been established.

As for personnel generally, the Air Force has a strong appeal for independent and adventurous young men. It is a glamorous new field, its activities are often intensely dramatic, and for pilots there are opportunities to exercise individual skill and initiative which seldom occur in the older services. While in future wars the allocation of manpower is likely to be determined from some central source, the Air Force is likely for some time to have a specialized appeal. Because it has that appeal, it can get and retain men of exceptional abilities and can avoid to some extent the devel-

14. Hanson Baldwin, "No Air Force Academy," *New York Times,* December 21, 1947.
15. *New York Times,* November 10, 1948.

opment of the bureaucratic lethargy which in times past has hampered the activities of the Army and the Navy.

PRESENT STATUS OF MILITARY ORGANIZATION

Headquarters. The headquarters of the Department of Defense is in the Pentagon Building, a huge and complicated structure erected just before the United States entered World II as the new home of the War Department. In an Army publication it is described in the following ecstatic language:

> It is three times the size of the Empire State Building and 50 percent greater than Chicago's Merchandize Mart. It covers 34 acres and has 17½ miles of corridors. It has five floors, two basements, five concentric rings, and ten spoke-line main corridors. The National Capitol would fit into any one of its five pie-shaped sections . . . Almost every aspect of its operation furnishes a superlative for statisticians. It contains more than 28,000 miles of telephone wire, and maintains the largest single food-serving operation in the world. Ten tons of baled waste paper are collected every 24 hours and sold for about $75,000 yearly. At the peak, it housed nearly 33,000 workers, the average working population of a city of 100,000.[16]

This description reflects the pride in physical size and power which characterizes the thinking of military men. Giving free rein to the growth of military power would have been frightening in earlier days of isolationism and seemingly assured peace. Perhaps it should be frightening today. Yet there may be counter-implications in another quotation which reads as follows:

> Today, in the basement of the Pentagon Building in Washington, one can walk through at least a quarter of a mile of captured papers that constitute the central record of Hitler's army.[17]

A military organization which can so completely shatter a major enemy that it can bring back its archives intact has done a great deal toward justifying its existence. However that may be, "The Pentagon" has become a symbol in Washington which is rivaled only by "The Hill," where Congress meets, and "The White House." Somewhat facetiously, reporters have attempted without avail to build up the symbolism of "Foggy Bottom" where the Department of State now inhabits a building which was vacated by the War Department when it moved into the Pentagon. The State Department finds itself neglected by comparison with the military in terms of symbols — which are highly intangible but important, nevertheless, in determining the drift of power among government agencies.

Personnel. Except in time of actual war, the armed services have not

16. Major Robert B. McBane, "The Pentagon Makes Sense," *Army Information Digest*, vol. II (January, 1947), p. 47.

17. William Harlan Hale, reviewing *Hitler and His Admirals* (New York: E. P. Dutton, 1948) by Anthony K. Martienssen, *New York Herald Tribune Weekly Book Review*, January 2, 1949.

hitherto employed any large percentage of the able-bodied population. With the changed position of the United States in world affairs, however, military employment has inevitably increased. As of the end of 1949, the total military personnel consisted of 1,551,000 officers and men.[18] The federal budget for the fiscal year 1951 as submitted by the President called for 1,507,000 military man-years — 630,000 for the Army, 461,000 for the Navy and Marine Corps, and 416,000 for the Air Force. Complementing the active army was to be the National Guard with 350,000 men and the Organized Reserve with 255,000.[19] The potential manpower was therefore somewhat more than 2,100,000. Since we lack accurate figures on the military manpower of potential enemies it is not possible to make accurate comparisons, but it seems clear that as armed forces go our totals are not large. While they represent a vast change from earlier periods of nominal peace, they do not of themselves indicate that the United States has become a militaristic nation.

Group Discrimination. The armed services have their problems of group discrimination. In time of peace, personnel consists largely of men. Experience during World War II demonstrated the fact that in many important activities men could be replaced by women and, although they have not been employed in actual combat, it seems likely that they will play a prominent part in any future war. As a matter of policy the government refrains from conscripting ministers of recognized religions. Again as a matter of policy and not of constitutionality, it refrains from forcing into combat conscientious objectors who can prove that they object in good faith. Conscientious objectors may be used for non-combat services in some form, but they are not made to fight. People who do not meet prescribed physical and mental standards are also exempted from military service. One of the shocking disclosures of the conscription records of World War II was that millions of young people, for one reason or another, were found to be incompetent for military service.

Conscription makes no distinction in terms of race. Citizens of all races and colors are called up for examination. The most important minority racial bloc in the United States consists of Negroes. Throughout World War II, the armed services segregated the Negroes and provoked from them complaints of unfair treatment. One result of this dissatisfaction was that in July, 1948, President Truman issued an executive order reading in part as follows:

> It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion, or national origin. This policy shall

18. *Semiannual Report of the Secretary of Defense*, July 1, to December 31, 1949, p. 4. See the chart indicating the comparative strength of the three services on p. 3. These figures do not take into account the expansion which came after the outbreak of war in Korea.

19. *Department of Defense Appropriations for 1951*, Hearings, House Committee on Appropriations, 81st Cong., 2d sess., p. 45.

> be put into effect as rapidly as possible, having due regard to the time required to effectuate any necessary changes without impairing efficiency or morale.[20]

The Secretary of Defense reports that the policies of all three military departments have been brought into conformity with this basic policy.[21] It remains to be seen how effectively regulations and official pronouncements can offset deep-rooted racial prejudices.

Government Within the Armed Forces. Government within the armed forces is entirely different from civil government as we know it in the United States. Absolute obedience is necessary in combat, and has long been enforced in other military situations, so that the system is authoritarian from top to bottom. At every level the command of a superior officer is law. Nevertheless a minimum code of justice has been evolving in the armed forces of the United States and of other countries for many decades. Congress has legislated on the subject at various times, usually incorporating into law much of the body of rules which has been formed. Such law is now compiled in a *Uniform Code of Military Justice* which was worked out over a number of years following the close of World War II and enacted in 1950. Although the code is calculated to limit the arbitrary power of commanding officers and provide a minimum of uniform justice, military law is inevitably more authoritarian than civil law. The superior officer has more power and is restricted by fewer safeguards of the rights of others. The dominant conception in military thinking is one of command. Armed forces are maintained not for the good of their members but for the defense of society. The concern of military justice, therefore, is first of all for military success and only secondarily for the welfare of men in uniform.

The operations of courts within the military system, which are known as courts martial, are often offensive to persons accustomed to the procedures of civil justice. There is no requirement of indictment by grand jury or trial by jury. There was until recently no right of representation by counsel with adequate training. Courts martial consisted only of officers. There was no adequate separation between judicial and executive power. After both world wars, the protests of civilians temporarily caught within the military machine brought revision of the procedures. The new code gives some protection by providing that when a commanding officer is the accuser the court shall be convened not by him but by a superior competent authority. The accused is entitled to the protection of qualified counsel. If he is an enlisted man, one third of the members of the court will at his request be enlisted men.

The Uniform Code provides more safeguards in trial procedure than ever before in the military sphere. The more serious offenses naturally get

20. *New York Herald Tribune*, July 27, 1948.
21. *Semiannual Report of the Secretary of Defense*, July 1 to December 31, 1949, p. 110.

most attention. For them there is a right of review in the office of the Judge Advocate General of the service involved. In addition, the code established a new Court of Military Appeals, lodged in the Department of Defense but not subject to control by the Secretary of Defense, which has jurisdiction in the following cases:

> 1. All cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death;
> 2. All cases reviewed by a board of review which The Judge Advocate General orders forwarded to the Court of Military Appeals for review; and
> 3. All cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.[22]

These provisions for review of court martial trials give a limited protection against the authority of commanding officers in military justice. Some military leaders insist that full protection can never be given and ought not to be given. General Dwight D. Eisenhower is quoted as saying in 1948 that

> It is impossible to conceive of the Army as an institution that completely parallels our democracy all the way through. It is a group that is given a job, in emergency, conducted under conditions of the greatest terror, of the greatest kind of fright and privation at times, to do a particular job.
>
> So this division of command responsibility and the responsibility for the adjudication of offenses and of accused offenders cannot be as separate as it is in our own democratic government. Somewhere along the line — and I don't care particularly where it is — but somewhere the man who makes the final decision must have also on his shoulders responsibilities for winning a war; and please never forget that.[23]

The General's point is of course well taken. It is also to be remembered, however, that as the military comes to play an increasing part in our national life, infiltrations from the military into civilian areas become matters of ever greater concern. Unless we can civilize the military we are likely to militarize the civil. The authoritarian character of military justice is not to be welcomed into the camp of democracy. As an indication of the harshness of military justice it is to be noted that under the Uniform Code even without a court martial an offender may be confined on bread and water for three days.[24] It is reported that responsible officers were acquitted for confining an American soldier in a prison camp in Germany in a freezing cell until his feet were so badly frozen that they had to be amputated.[25] The Uniform Code provides that

> Any officer who uses contemptuous words against the President, Vice President, Congress, Secretary of Defense, or a secretary of a department, a governor or a legislature of any state, territory, or other possession of the

22. Public Law No. 506, 81st Cong., Art. 67, sec. b.
23. From an address delivered by General Dwight D. Eisenhower before members of the New York Bar at the Lawyers' Club on Nov. 17, 1948. Reprinted in letter to the *New York Times* dated February 24, 1949, by a committee headed by Knowlton Durham, in the *Times* of March 1, 1949.
24. Public Law No. 506, 81st Cong., Art. 15, sec. (a) (F).
25. Editorial, Baltimore *Sun*, March 6, 1949.

> United States in which he is on duty or present shall be punished as a court-martial may direct.[26]

It is of course clear that officers in the armed forces can not be permitted to stir dissension by delivering harangues against officials of the government. It is also clear, however, that some government officials sometimes do or say things which merit the contempt of the American people, among whom army officers are included. When, as during World War II, some 11 million men are under arms, their officers are likely to include pre-military civilians of outstanding judgment and ability. To censor them in this fashion is to endanger democracy. The military tendency toward unnecessary suppression of free speech must be jealously watched.

DEVELOPMENT OF MILITARY WEAPONS

Defense Department Research. It has been said that

> World War II was the first war in human history to be affected decisively by weapons unknown at the outbreak of hostilities. This is probably the most significant military fact of our decade: That upon the current evolution of the instrumentalities of war, the strategy and tactics of warfare must now be conditioned.[27]

During World War II the federal government had a central organization of approximately 30,000 scientists and engineers working on new weapons and new medicines. They spent half a billion dollars at the task and produced amazing results.[28] By the National Security Act of 1947 Congress established the Research and Development Board to continue supervision of research and experimentation to increase the deadliness of American weapons. The work continues with the same secrecy as before, and is concealed from the public even more completely than during the war, since concealment from possible enemies is essential to maximum effectiveness in war. The board has a distinguished scientist as a full-time chairman and one or more members from each of the military departments. It supervises scientific work within each of the military departments to prevent unnecessary duplication and waste of government funds and supplies. The Department of Defense reports that

> The research and development program, comprised of some 13,000 projects, is carried out by the three military departments, partially in service laboratories but largely by contract with industrial organizations and academic institutions. For the fiscal year 1949 the half-billion dollars allocated for research and development was divided as follows: army, 21 percent; navy, 42 percent; air force, 37 percent. This division does not necessarily reflect relative emphasis, however; for the construction of expensive prototypes accounts for a substantial portion of the research and development dollar.[29]

26. Public Law No. 506, 81st Cong., Art. 88.
27. Vannevar Bush, quoted, *Department of Defense Appropriations for 1951*, Hearings, House Committee on Appropriations, 81st Cong., 2d. sess., p. 155.
28. Vannevar Bush, *Modern Arms and Free Men* (New York: Simon & Schuster, 1949), p. 6.
29. *Second Report of the Secretary of Defense*, 1949, p. 58.

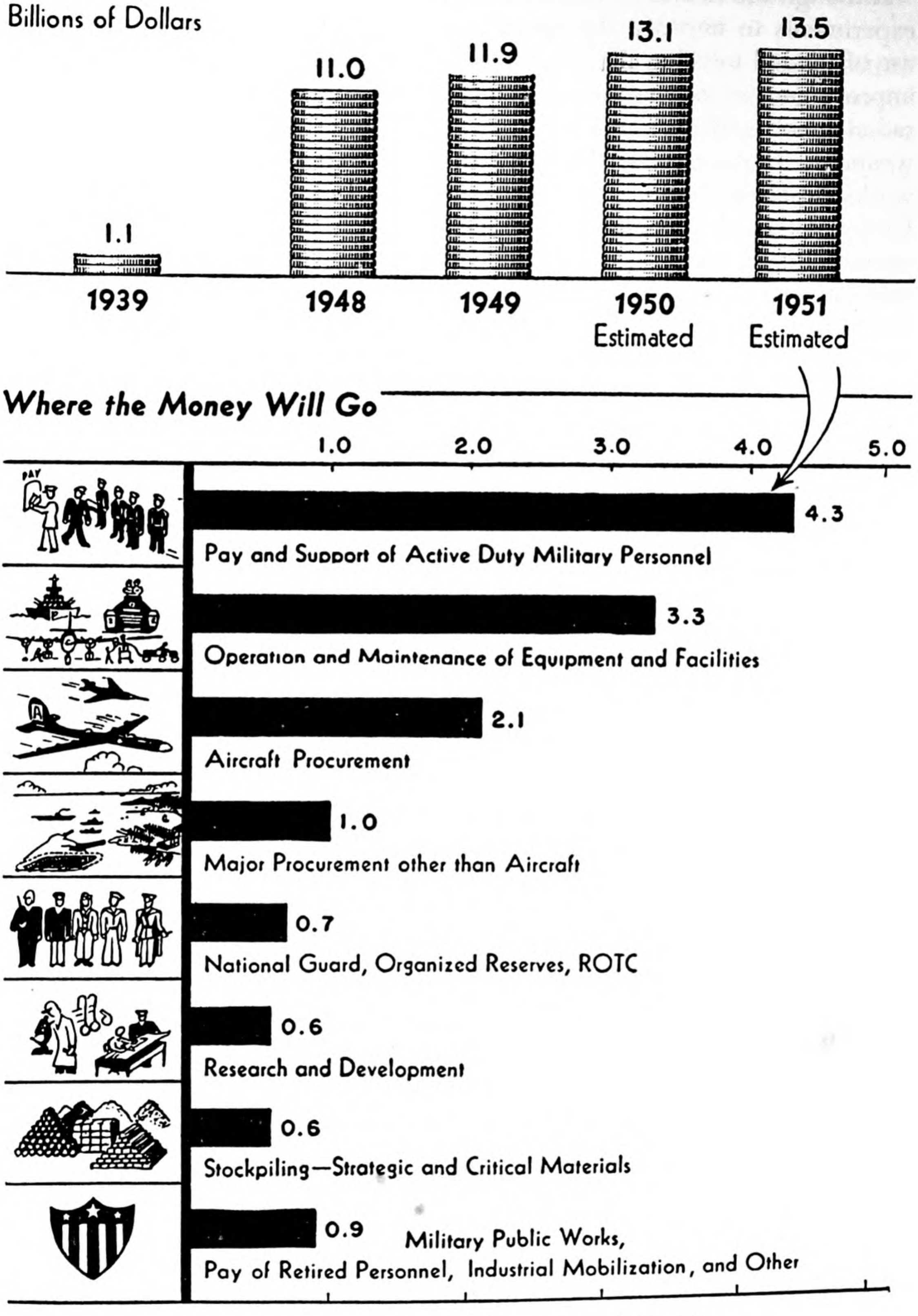
Although the details of research are kept secret, we know that it includes experiments to improve the speed and carrying capacity of airplanes, the use of guided missiles, the improvement of ammunition and explosives, the improvement of submarines, development of the instruments of biological, radiological, and chemical warfare, and defenses against these and other weapons. In overseeing this work the Research and Development Board works closely with other agencies such as the Weapons Systems Evaluation Group within the Department of Defense and the National Security Resources Board, the Central Intelligence Agency, the Atomic Energy Commission, the National Advisory Committee for Aeronautics, the United States Geological Survey, the Department of Agriculture, the Department of Commerce, and other agencies.[30]

Atomic Weapons. The development of atomic weapons takes place largely outside the Department of Defense, partly because it was deemed unwise to put such a potential of energy exclusively in the hands of the military. Jurisdiction was lodged in a five man Atomic Energy Commission which has, however, a Division of Military Application. The Department of Defense has a Military Liaison Committee, which with the addition of civilian members also serves as the Atomic Energy Committee of the Research and Development Board. We know that the Atomic Energy Commission has laboratories and production plants at various points throughout the United States. We know that it has experimental grounds on Eniwetok Island in the Pacific Ocean. We know that it is working on a so-called hydrogen bomb which is inconceivably more powerful than the original "A-bomb." Beyond these superficial facts, the activities are secret, and we are largely content to have them so if veils of secrecy can shut out possible enemies as well as the American people.

The Cost of Defense. Preparation for total war is expensive, and military men are seldom economy-minded. Having tasted appropriations at the rate of $100 billion a year during World War II, they have approached problems of peacetime defense with over-expanded imaginations. The Hoover Commission reported that the preliminary budget estimates of the three military departments for the fiscal year 1950 ran to more than $30 billion. This fact indicates the state of mind, even though the amount was eventually cut in half. The commission found that the present budget of the armed forces represented about $100 per capita for the nation, as contrasted with some $2.25 before World War I. It reported that

> Military budgets are not drawn with careful consciousness of cost factors. For example, an examination of the 1950 budget revealed estimates requesting modernization of 102 more tanks of a certain type than the Army actually possessed. In another case, a misplaced figure added some $30,000,000 to budget estimates.[31]

30. *Ibid.*, p. 62.
31. *The National Security Organization,* House Doc. No. 86, 81st Cong., 1st sess., pp. 11–12.



BUDGET EXPENDITURES: NATIONAL DEFENSE

The Hoover Commission task force on National Security Organization noted

> The awful cost of reasonable safety — $1,000,000 to $4,000,000 for a modern bomber, over $250,000 for a tank, $10,000,000 to $150,000,000 for a ship — has put a high premium upon military economy.[32]

As an example of military carelessness in handling supplies, it noted that according to army statistics 25,000 of the 85,000 tanks produced for the army during the war were still on hand at the end of it. Yet of that total the army could account for only 16,000.[33]

Military wastefulness, both in estimates of need and in actual expenditure, was the incentive for further centralization of control over the three military departments in the Department of Defense and for the budgetary revision of military practices which the Hoover Commission recommended. It remains to be seen whether fundamental changes in attitude and behavior can be induced.

MILITARY AND NON-MILITARY FOREIGN POLICY

The National Security Council. There is inevitable overlapping between the responsibilities of the Department of Defense and the Department of State in shaping foreign policy. Problems of peacetime diplomacy and of national defense cannot always be separated. If he seeks advice about aid to Europe or Southeast Asia or Korea, or about the desirability of recognizing revolutionary governments anywhere in the world, or about retaining American occupation troops in foreign countries, the President may get one type of answer from the Secretary of Defense and another from the Secretary of State. With the backing of his own department, each brings a special point of view to the subject. To coordinate such different interests and recommendations, the National Security Council is maintained in the Executive Office of the President. It consists of the President, the Vice President, the Secretary of State, the Secretary of Defense, and the chairman of the National Security Resources Board, with an executive secretary and a small staff.

The council meets regularly on the first and third Thursdays of each month. The President usually does not attend the meetings, leaving his subordinates free to present their opinions and to work out consistent advice to him if possible. Problems come to the council when the President asks it for advice and when a member of the council presents a problem in foreign affairs overlapping two or more agencies. The council works on such problems, aided by its staff and by personnel borrowed from the member agencies. If it reaches agreement it presents a unified report to the President. If not, it presents a split report. With or without the advice of the council, the President must in the end assume responsibility for foreign policy decisions, and he may either accept or reject the council's recom-

32. Hoover Commission, *Task Force Report on National Security Organization* (Appendix G), p. 5.
33. *Ibid.*, p. 6.

mendations. It is apparent, however, that President Truman has relied heavily on its advice.[34]

The National Security Resources Board. During World War II we learned well the lesson that military plans had value only as far as resources are available to carry them out. Without continuing study and correlation of information it is impossible to know what our resources are. The National Security Resources Board, in the Executive Office of the President, was established to make and keep such information available. It is composed of a full-time chairman, who is also a member of the National Security Council, and the Secretaries of State, Defense, Treasury, Labor, Agriculture, Commerce, and Interior. The Joint Chiefs of Staff in the Department of Defense make military plans, and by what are called "feasibility tests," they attempt to plot their actual operation of the plans. From the Munitions Board in the same department, the National Security Resources Board gets estimates of the resources needed for execution of the military plans and then seeks to find whether those resources are available. The member departments and other agencies are called upon to aid in the measurement of available resources. Operating in this fashion the government hopes to know what it can do and how it can do it if a military emergency arises.[35] Because it is nearly impossible to envisage war conditions in time of peace, as well as for other reasons, the board has had difficulty with its task, but the importance of its assignment is unquestioned.

The Central Intelligence Agency. With the growing concern about secrecy in the conduct of foreign affairs, investigative agencies in a number of departments became involved, with overlapping of effort and inadequate coordination. To coordinate these efforts, the Central Intelligence Agency was created in the National Security Council. It is concerned exclusively with intelligence in the foreign field but it maintains contact with the intelligence agencies of the military departments, the Secret Service of the Treasury Department, the FBI, and others. These relationships are indicated by the answer of J. Edgar Hoover, director of the Federal Bureau of Investigation, when asked about the connection between the CIA and the FBI:

> Our relationship with them has been entirely harmonious, but they have a definite jurisdiction, having jurisdiction only in the foreign field. We cannot operate in the foreign field and they cannot operate in the domestic field.
>
> We have a liaison agent of our Bureau who is at the CIA practically all of the time for the exchange of information back and forth. So far as I can see it has worked entirely harmoniously.[36]

34. For discussion of the work of the National Security Council see *Department of Defense Appropriations for 1951*, Hearings, House Committee on Appropriations, 81st Cong., 2d. sess., pp. 1–15.

35. For discussion see *ibid.*, pp. 16–42.

36. *Department of Justice Appropriations for 1951*, Hearings, House Committee on Appropriations, 81st Cong., 2d. sess., p. 242.

With the growing importance of foreign affairs and the activities of foreign agents in the life of the nation, the work of the CIA becomes increasingly important.

MILITARY AID AND MILITARY ALLIANCES

Giving military aid to other countries in time of nominal peace and entering into military alliances, as through the Atlantic Pact, marks a new chapter in American history. In addition to the billions spent directly through our own Department of Defense we provide other billions for the military establishments of other countries. In addition, we are agreeing to a program of specialized contributions by our Atlantic Pact allies which will enable each member to perform the defense functions for which it is best equipped, relying on other members for the performance of other functions. President Truman has stated to Congress that

> The North Atlantic Treaty countries have agreed on the general role which each is to play in the common defense. We are succeeding for the first time in history in overcoming considerations of national prestige and tradition, under which each nation felt bound to equip itself completely with men and resources in every branch of military activity. Our common defense planning, instead, will be based on a considerable degree of specialization. This will bring a much larger total strength from the resources devoted to defense purposes.[37]

So it is that on the one hand we share our resources with other friendly nations of the world and at the same time to a limited extent admit dependence on other nations for our own defense. Since we are by far the richest and most powerful member of the Atlantic Pact, the facts of the situation do not show how far we would be willing to go in giving aid and in relying on the support of others if we were not in position to exert a strong influence over the military arrangements to which we agree.

References

Bernard Brodie, ed., *The Absolute Weapon; Atomic Power and World Order* (Harcourt, Brace, 1947).
Vannevar Bush, *Modern Arms and Free Men* (Simon & Schuster, 1949).
Lawrence H. Chamberlain, *The President, Congress, and Legislation* (Columbia University Press, 1946).
Elmer Davis and Byron Price, *War Information and Censorship* (American Council on Public Affairs, 1943).
David L. Gordon and Royden Dangerfield, *The Hidden Weapon* (Harpers, 1947).
E. Pendleton Herring, *The Impact of War* (Farrar & Rinehart, 1941).
Laurence V. Howard and Hugh A. Bone, *Current American Government; Wartime Developments* (Appleton-Century, 1943).
Jerome G. Kerwin, ed., *Civil-Military Relationships in American Life* (University of Chicago Press, 1948).

37. *Congressional Record* (temporary daily edition), June 1, 1950, p. 8003.

James R. Newman and Byron S. Miller, *The Control of Atomic Energy* (McGraw-Hill, 1948).

Fletcher Pratt, *A Short History of the Army and Navy* (The Infantry Journal, 1944).

James T. Shotwell, *War as an Instrument of National Policy, and its Renunciation in the Pact of Paris* (Harcourt, Brace, 1929).

Herman Miles Somers, *Presidential Agency; The Office of War Mobilization and Reconversion* (Harvard University Press, 1950).

Henry L. Stimson and McGeorge Bundy, *On Active Service in Peace and War* (Harpers, 1948).

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War and Its Aftermath

A shift from peace to a state of war transforms the life of the entire nation. In peacetime, although individuals and private and government groups think to some extent in terms of the public welfare, it is deemed right and proper that in general private considerations should be uppermost; the general welfare is thought of primarily as a total of individual welfares rather than as an entity of itself. In wartime, however, there is a single national goal — defeat of the enemy. Individual and group competition and rivalry continue and may even be intensified, but they take place within the framework of an integrated national program. Economic and social drives are geared into that program. Victory becomes a goal of agriculture and industry and labor, of education and religion, and even of entertainment. Farm and factory, union and corporation, school and church, theater and home, cooperate for the common purpose. Private rights lose some of their sanctity, civil liberties undergo curtailment, and individual pursuit of life aims is subordinated to the purpose of defeating the national enemy.

Because wars involving the United States have occurred only intermittently and these have differed greatly, it is hard to discuss the waging of war in general as distinguished from the waging of particular wars. Pre-Civil War conflicts differed so greatly from modern wars that they throw little light on the conditions of warfare today. The Civil War itself tells us little of current value except as it highlights problems which might recur if we again became involved in a war in which the American people were sharply divided. It is only with World War I that the conditions of modern total warfare are approximated, and it is presumably World War II which most closely approximates any war now threatened. Even here the resemblance is likely to be incomplete, since the centers of world power will have shifted, new methods of warfare will have been developed, and the attitudes of the American government and people will have yielded to different patterns. Yet in spite of the differences among wars, it is possible to summarize broadly the processes of over-all mobilization for war, organization for cooperation with allies, the restriction of conventional rights and liberties, and the aftermath of readjustments which come with victory.

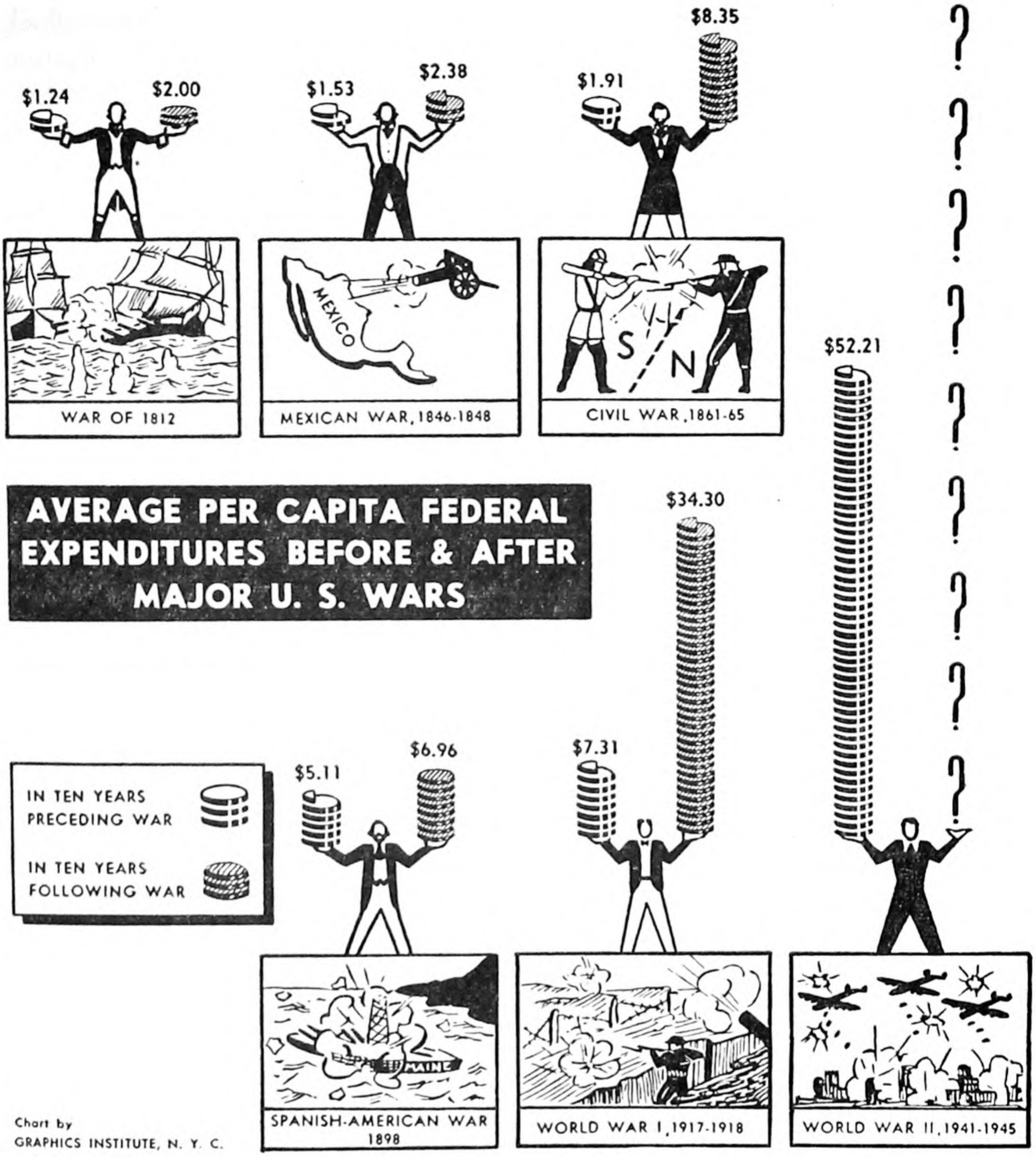
MOBILIZATION FOR WAR

Military Mobilization. Wars like other major events cast their shadows before. Seldom, if ever, has the nation been involved in war without premonitions and some preparation. Prior to the Civil War, it was the division of the country rather than the imminence of conflict which prevented military preparation. Prior to World War I, the United States was building up its army and navy even while it was reelecting a President on the slogan "he kept us out of war." Prior to World War II, expansion of the United States navy was well under way before the outbreak of European conflict in 1939, and we resorted to conscription in 1940 even as the President, seeking reelection, promised that American boys would never be sent to fight in any "foreign war."

The outbreak of actual warfare, however, makes a tremendous difference in the character and effectiveness of military training. For American boys there is something unreal about military drill in the absence of war. Morale among peacetime conscripted men is likely to be low, and rigid military discipline is hard to enforce. There was all the difference in the world between military training prior to the outbreak on December 7, 1941, and that which followed. By contrast with peacetime, when men are killing and being killed it is possible to approximate the conditions and atmosphere of actual warfare.

Modern war calls for such complete utilization of manpower that the individual must be increasingly limited in his choice of service. The ranks of the infantry must be filled even though filling them involves conscription of many who would prefer to serve in the Navy or the Air Force. Some men who would rush into military combat must be restrained because their skills have greater value in scientific laboratories or in other activities. Specialized factory workers may have to be exempted from military service. It is necessary to plan for the future as well as for the immediate present; young men with unique capacities for training in important fields must be allocated to training schools instead of being equipped for battle. Because the mobilization of manpower involved problems much more extensive and complicated than conscription of soldiers and sailors, the agency called the Selective Service System, during World War II and under the Selective Service Act of 1948, was kept independent of the military departments.

Civilian Manpower. The United States has not in any past war gone as far as Great Britain and some other countries in allocating men and women to particular civilian employments in particular places and requiring that they serve there and nowhere else except as authorized. True, some military deferments have been based on the character of the civilian service being rendered. The War Manpower Commission, which was established during World War II and with which the Selective Service System was for a time connected, was influential in distributing workers to needed employments, but it had no adequate powers of coercion over civilian manpower. It



helped workers find jobs and helped war industries find workers, and it attempted in various ways to encourage labor for war production. It sometimes got results by acting as if it had coercive powers even though such power was not actually provided. It was withheld because people generally were not ready to accept governmental conscription of manpower to serve under private employers who, while producing for war, were also producing for private profit. When the government acted against strikes in war plants, it did so by taking over the management of the plants. In the light of the trends observable in both world wars, however, it seems probable that in any future prolonged warfare both the management of war plants and the allocation of manpower may become the functions of government.

Whatever the extent of control of civilian manpower, war production

brings tremendous dislocation of the working population. Workers flock to new industries or to old ones which have been converted to war production. Congested areas lack housing, transportation, schools and churches, and marketing facilities. Drastic reorganization of community life is necessitated even at the risk of building up what may become ghost towns in the postwar period. The flow of workers to war production areas disrupts habits of individual and family behavior and generally disturbs those sentiments about human conduct which determine the character of established communities. Farms and peacetime production centers not converted to war production suffer the loss of workers.

Mobilization of Production. War requires not only manpower but also ships, tanks, planes, guns, ammunition, and other equipment, with plants to produce them and transportation agencies to deliver them where needed. Equipment, plants, and transportation require steel, copper, aluminum, chemical compounds, and other raw materials. Preparation for war usually begins with production of war materials in competition with production of civilian goods. Speedily, however, the military demands become so great that civilian production has to be cut back and in some fields stopped altogether. As war production expands, shortages of materials develop in spite of curtailment or cessation of civilian production. Choices have to be made between ships and planes, submarines and trucks, railroad engines and big guns, and between goods and services for the military generally and for the civilian population.

Timing in war production is enormously important. If a war can be won quickly by concentrating all resources on an immediate effort, it would be unwise to divert mass resources to constructing plants which could come into production only months and years hence and to postpone mass production of weapons until improvements have been worked out. On the other hand, if at best the war will last a long time, then it is foolish to exhaust resources in current military production without preparing for extended production and the development of new weapons some time in the future. Unfortunately wars cannot be planned and waged with mathematical precision. The enemy may have a lot to say about when or whether a victory will be won. Governments must take the risk of deciding whether to put everything into a knock-out blow or to withhold resources for future production. Some of the greatest wartime pressures develop over such decisions and the resulting decisions on detailed allocations of materials.

Priorities. The tendency in two world wars has been for the military to demand more of every kind of military equipment than could be produced, to emphasize current need as against future production, and to stress the needs of the military over those of civilians. In view of the inevitable shortages all along the line, priorities have to be worked out, and military leaders assume that such decisions ought to be in military hands. It was said of the beginning of World War II that

It was the doctrine of the Army that the military should take direct control of all elements of the economy needed for war, once war was declared. Under "total" war, this would include total control of the nation, its manpower, its facilities, its economy. Starting with this simple and "logical" concept, and being absolutely certain from 1939 on that war was coming, it was natural that the generals and colonels and majors, even those drawn from civilian life, were dissatisfied with the President's slow approach to war mobilization and with his reliance upon civilian personnel in all of the posts which were concerned with labor, industry, public opinion, and the economy. In spite of these decisions by the President, the Army never gave up the effort to increase its control in these areas.[1]

Although during neither world war were the control of production and the allocation of priorities completely centralized, there was each time a tendency toward centralization in a civilian board headed by an administrator. During World War I the War Industries Board[2] achieved great power, and during World War II the agency was the War Production Board. It is said that

> In the creation of the War Production Board, all power over procurement, except for food, and over production and industry were placed in the hands of a single administrator responsible to the President alone. Procurement — the making of the contracts for production — was delegated to the armed services, the Maritime Commission, and other procuring agencies, however; and the WPB endeavored to control the size of the procurement program and through a series of controls over the use of materials to manage the economy.[3]

A struggle raged continually between the board and the military for the control of scarce materials. It is said, for example, that the chairman of the board was "always in opposition to the Army on short-sighted restrictions of steels for the railroads, for agricultural machinery, and for industrial spare parts."[4]

War terminates production of some civilian goods and reduces the production of others. During World War II production of passenger automobiles, washing machines, refrigerators, radios, and many other articles was suspended. Always in controversy was the question of what materials ought to be used to keep old equipment in operation. Existing automobiles, for example, were needed for local transportation. What provision should be made for production of spare parts? To conserve cars and fuel the government rationed gasoline according to business needs. Yet it allocated a limited amount of gasoline which could be used for pleasure driving largely to conserve cars, which would deteriorate less rapidly if used to a limited extent than if not used at all.

Factories and Production Contracts. In large part the government secured production of military equipment by letting contracts to private producers.

1. Bureau of the Budget, *The United States at War* (1947), p. 129.
2. See Grosvenor B. Clarkson, *Industrial America in the World War* (1924)
3. Bureau of the Budget, *op. cit.*, p. 133.
4. *Ibid.*, p. 128.

Factories of many kinds, including automobile plants, steel plants, rubber plants, and so on, could be converted to war production with a minimum of difficulty. In addition, old plants were vastly expanded and new ones were built. The government provided much of the financing for both purposes. In some instances it paid for construction of plants and turned them over to private producers for operation. To produce synthetic rubber it constructed virtually a new industry, which became necessary when the Japanese conquest cut us off from our normal supply of natural rubber. To produce atomic bombs, the government built vast laboratories and plants, operated them with a maximum of secrecy, and kept control firmly in its own hands.

Price Control. When the government stopped or restricted production of civilian equipment so that scarcities developed, and when it began heavy buying of agricultural products so that there was less food for civilians than they wished, higher prices were inevitable if the market was to be left free. Yet higher prices would have borne heavily upon people with low incomes and would have led to probably irresistible demands for higher wages. The government intervened to stabilize both wages and prices. Primarily through the Office of Price Administration it froze prices, making adjustments here and there as circumstances required, and issued ration books to provide for fair distribution of basic food items and of shoes, gasoline, and fuel oil. Although resistance to rationing and price control developed after the end of the war, producing gigantic black markets, the system preserved market stability during the critical years and would inevitably be reintroduced in a probably more elaborate form in the event of another war.

The government made contracts for industrial production which protected industry against possible losses, and it attempted to keep profits within reasonable dimensions by subsequent renegotiation of contracts in the light of actual costs. Producers welcomed protection against losses but fretted at governmental barriers to private enrichment. Judge Elbert H. Gary, a steel magnate of the period of World War I, is reported to have declared that "manufacturers must have reasonable profits in order to do their duty."[5] At that time lawyers, judges, and civilians generally had a firm belief in the sanctity of private property, the right to earn profits, and the immunity of prices from government control. Such beliefs had lost some of their assurance by the time of World War II and particularly as they related to business connected with the war. In dealing with the fixing of rents during the war period, the Supreme Court spoke as follows:

> Congress was dealing here with conditions created by activities resulting from a great war effort. . . . A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a "fair return" on his property.[6]

5. Quoted, Pendleton Herring, *The Impact of War* (New York: Farrar, 1941), p. 198.
6. *Bowles* v. *Willingham*, 321 U.S. 503, 519 (1944).

Mobilization of Government Agencies. For government agencies as well as for individual citizens war brings a new order. Military departments find the actual management of a war very difficult from the supervision of military personnel and equipment in time of peace and from the preparation for a war which may never come. Largely ignored in time of peace, they now become the center of national activity. Morale is lifted. Numbers are multiplied. Uniforms attract a new respect, and military salutes carry a new snap. Military leaders and civilian authorities over them constitute a new elite which war brings into power.[7]

Other departments likewise undergo changes. The activities of the Department of State expand. The Department of Agriculture becomes a center of activity because of the importance of food production. Other departments, while adapting themselves in part to the new national purpose, may have difficulty in fitting immediately into the scheme of things. Although war produces complicated problems of commerce and industry, the Department of Commerce, which is organized to promote business under peacetime conditions, usually finds it difficult to cope with the new problems. It may therefore find itself by-passed in the allocation of responsibilities to other agencies. The Department of Labor may be similarly treated. Labor is vital to the winning of the war, but a department geared to serve labor may not be able or willing to exercise the coercive power over labor which may be necessary. The Department of Justice, although called upon to give opinions in legal matters and to prosecute law cases, is likely to be outside the main stream of activity. Its anti-trust program in particular is likely to be shunted aside through fear that suits to break up combinations in restraint of trade may harass business and hamper war production.

New Agencies. Because it is often easier to create new agencies for new functions than to readapt old ones, war brings a proliferation of governmental organizations which continue through processes of reorganization, reallocation of functions, combinations, and so on until the end of their existence. A mere list of such organizations and their transformations during World War II gives a bewildering demonstration of the complexity of war activity within the government. Many of them are described in the *United States Government Organization Manual* for the war years. Those which survived are listed in later editions of the same document and many which have been abolished are listed in the appendix of the current issue.

The new agencies such as the War Production Board of World War II that operate near the center of power, like the military departments, are headed by a new elite. Businessmen who in time of peace would not think of working for the government and at government salaries now accept emergency appointments in order to render patriotic service, for the power involved, or for the opportunity of taking care of their own businesses in connection with the war program. The influx into Washington is tremendous, housing is short, and transportation is difficult.

7. See Herring, *op. cit.*, p. 46.

Mobilization of Allies. When a nation goes to war it seeks the largest possible number of allies and the approving friendship or benevolent neutrality of those countries which refuse to join. At the beginnings of both world wars, the United States as a neutral was subject to the overtures and blandishments of both contending parties. Because dominant American sentiment already showed a definite bias, the German side, in the face of submarine attacks upon American trade with Germany's enemies, could hope for little more than continued American neutrality. Great Britain, on the other hand, sought not only a continuing flow of American supplies but increasingly favorable treatment, the cessation of trade with her enemies, and eventual American participation in the war. In addition to having more in common with the United States than had her enemies, Great Britain proved a more effective propagandist.

Even in the American Revolution, when help from France was secured against the mother country, the United States in time of war has played the game of seeking military allies. Once the United States had become a participant in World War I it used its influence in international trade to persuade Latin-American countries to join us against the enemy. In World War II the competition for allies was gigantic. The Axis powers sought to create disunity in the Western Hemisphere and in so doing to capture as much as possible of the trade of Central and South America. In the language of a government report,

> During the 1930's the Axis had bought large quantities of Latin American commodities and had paid for them in blocked currency which, since it could only be spent in Germany, curtailed the flow of free exchange and tied in the trade of the area to the Nazi economy. In addition, the other American republics were a potential field for colonization. Already there were considerable numbers of German nationals living in the Western Hemisphere, and under the program of the Nazis most of these persons had been drawn into a tightly-knit organization directed from Berlin. In addition, an attempt was made to enroll the even larger numbers of citizens of German descent living in the other American republics into a sort of "hemisphere fifth column" which would include not only German nations, but Japanese, Italian Fascist, Spanish Falangists, and Fascist elements native to the various countries. With the other American republics as a possible vulnerable flank for attack against the United States, economic penetration was inter-locked with a propaganda program, designed to arouse antagonism against the United States and disseminated through German banking houses and business firms as well as through German schools, cultural centers, athletic clubs, and other societies. Subsidized press agencies, Axis-controlled radio stations, and German-produced motion pictures also played their part in the attempt to attack the prestige of the United States.[8]

Through the Office of the Coordinator of Inter-American Affairs and other agencies, the United States rushed into competition with the Axis seducers. It provided loans for various types of economic enterprise, it stimulated the construction of highways and the expansion of airways and

8. *Historical Reports on War Administration: History of the Office of Coordinator of Inter-American Affairs* (Government Printing Office, 1947), p. 3.

other forms of transportation. It beamed radio broadcasts toward Central and South America and supplied books, papers, and motion pictures to improve Latin-American attitudes toward the United States. It portrayed the Axis powers as the enemies of the Western Hemisphere and used every possible persuasion to stop the operation of their airlines, to cut off their trade, and in other ways to diminish their influence. It helped to build up the armed forces of the Latin-American countries to strengthen hemispheric defense against the enemy. By the time of the formal entrance of the United States into the war, its work in Latin America had been so well done that most of the Latin-American countries quickly followed the United States into the United Nations. Argentina, the principal competitor of the United States for Latin-American influence, was the outstanding exception. Even there, in spite of strong pro-German and totalitarian influence, some concessions were eventually made.

The United Nations likewise attempted to influence the conduct of neutrals in other parts of the world. They had successes and also failures, notable among the latter being the Republic of Eire, which isolated itself under the shadow of Great Britain, and Sweden and Turkey, each of which maintained a position of balance between the warring powers.

THE WAGING OF WAR

Strategy. The Department of Defense must have experts constantly at work on theoretical plans for war against possible enemies. In working out such plans, emphasis, of course, tends to be placed upon the most probable enemy of the moment. Candidates for that position have included tribes of American Indians, Great Britain, France, Spain, Mexico, Germany, the Soviet Union, and other countries. Strategy varies with time and circumstances. Modern total war requires the mobilization of all the resources of the nation and plans for integrating every conceivable type of combat from propaganda warfare through hand-to-hand fighting to the inconceivably destructive use of atomic bombs. Since manpower and material resources are never sufficient for overwhelming action on all fronts at the same time, plans must be carefully laid in advance and priorities agreed upon. After the attack on Pearl Harbor in December, 1941, the United States had quickly to decide whether it would first make its major effort on the European front or on the Asiatic. It decided first to throw its weight into the war in Europe, allotting resources for little more than holding its own in the Pacific. At the same time, long range planning had to be done for the Pacific war which had eventually to be brought to a conclusion.

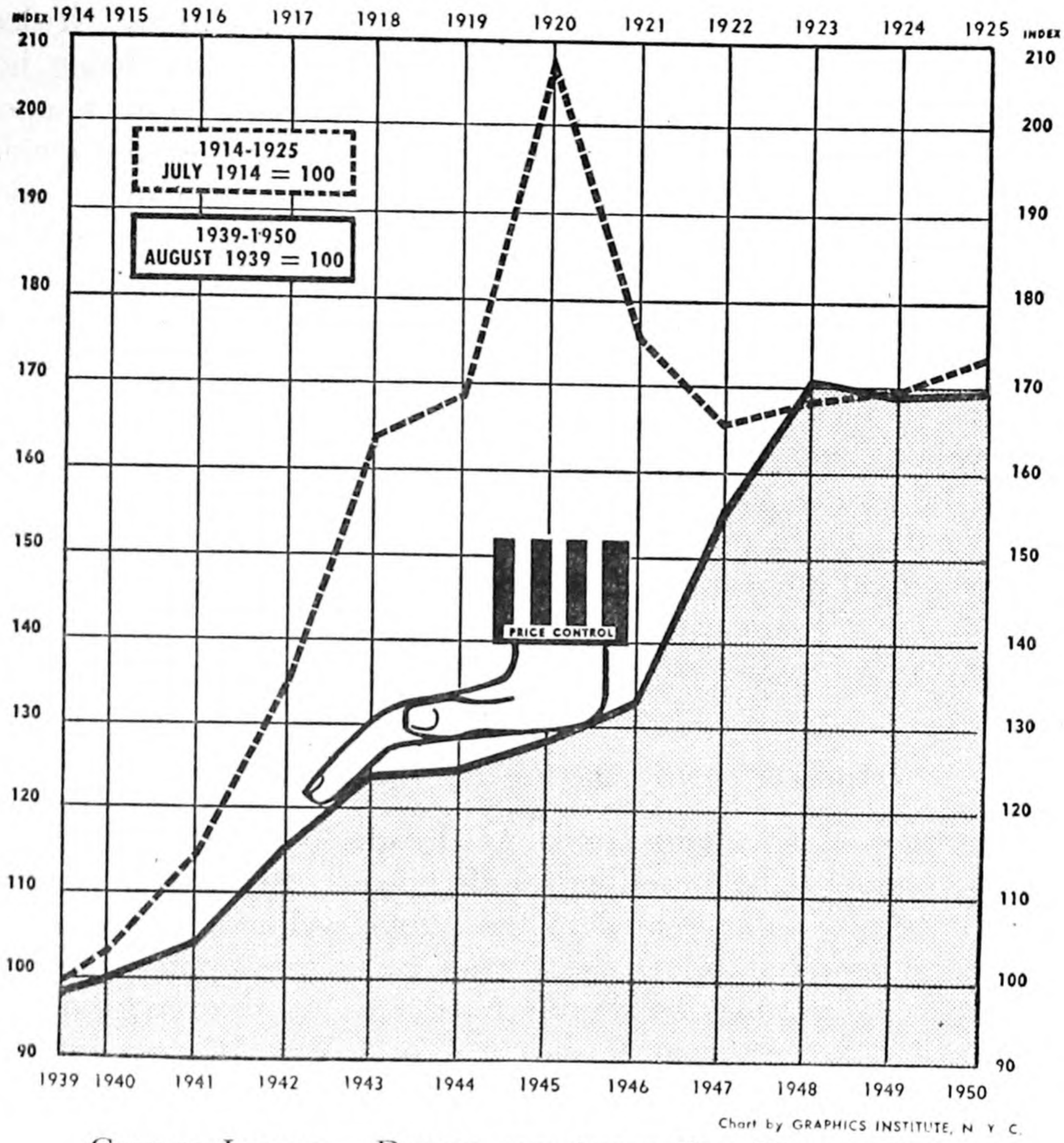
For the European front, similar decisions had to be made. The western allies debated for a long time whether or when they should invade the European continent or whether they should use air power and the blockade only as the enemy nations were gradually surrounded. Russia, of course, demanded an invasion of western Europe at the earliest possible moment to relieve pressure on the eastern front. Great Britain, with fresh tragic

experiences in trans-channel warfare, opposed early invasion. As the difficulties of a major landing on the western coast became apparent, the allies compromised by first landing in North Africa and defeating the Axis forces entrenched there. It was not until 1944 that sufficient resources were accumulated in England to permit a major landing in France.

Unity of Command. The lack of cooperation between the Army and the Navy which left us vulnerable at Pearl Harbor demonstrated the necessity of effective top coordination of all elements in the fighting forces. Emergency machinery was set up in Washington for that purpose. Unity of command proved necessary for the assault in North Africa and later for the war in Italy. As materials and manpower were accumulated in England to establish the western front, it was clear that United States land, sea, and air forces had to be directed from a central source. It was also apparent that there must be unity, not merely within our own forces but also of the forces of the several allies, particularly the United States and Great Britain. Since the United States was to carry the major burden in manpower and equipment, an American, General Dwight D. Eisenhower, was chosen for the leading position. His major potentialities were not those of a commander in the field but rather those of a diplomat who had the power to win the respect and the obedience of diverse and aggressive field commanders. In spite of inevitable bickerings and jealousies, he made himself the over-all manager of the gigantic invasion movement.

Such complete and aggressive unification, it is true, required not merely a highly skilled commander but also a strong sense of community of interest among the fighting nations. Although the United States shipped enormous quantities of war materials to the Soviet Union and discussed some aspects of the strategy of war, there was never any effective coordination between the East and the West. It is possible that both fought more effectively with the enemy between them than if they had been forced to act together.

Defeating the Enemy. In our Civil War, under the leadership of General Ulysses S. Grant the land forces of the United States defeated those of the Confederacy and brought them to unconditional surrender. The Confederacy itself was dissolved. The southern states, after a period of partial military government, were brought back into the Union. In World War I, Germany, the central enemy, was granted terms of peace. Although the victorious allies compelled abdication of the Kaiser and a change in the form of the German government, German territory was never overrun, and continuity of government was maintained. Feeling that undue leniency had been shown toward Germany at the close of World War I, the United Nations during World War II offered terms only of unconditional surrender. They shattered German cities and industries from the air and completely overran the country. They destroyed its government and forbade its reestablishment until after a period of military occupation and "denazifica-



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tion." With Italy the United Nations had been more lenient, with the result that after a separate peace, Italy became for some purposes almost an ally. Japan was also completely occupied, but the monarchy, while deprived of most of its power, was deliberately maintained as a focal point for the loyalties of the Japanese people to facilitate stable government.

Total War. All this is not to imply that future wars are sure to end in the same way. We may not win, or may come to an exhausted stalemate. This much is clear, however: modern war is not a conflict between military forces which may fight without serious disturbance to the civilian population and make peace when the leaders get tired of conflict. It involves the clash of whole populations and is inconceivably destructive. It annihilates cities, industries, institutions, and ways of life. It shatters the conquered and impoverishes the victors. Furthermore, involvement in war is not a matter of simple choice. It comes as a result of such gigantic tides in human events that, in the absence of a well-established world government, it may be impossible to prevent.

It is not true, as is sometimes said, that war settles nothing. It decides which nation or combination of nations shall for the time being hold a dominant position in the world. The settlement, however, is only temporary. The allied nations won over Germany in World War I at the incidental expense of releasing communism in Russia, but were too much weakened or wearied or disillusioned to keep Germany in permanent subordination. Germany was shattered in World War II to leave the Soviet Union and the western powers glaring at each other across the wreckage. There is no reason to believe that the destruction of either Russia or the United States would provide more than a temporary resolution of contending forces. Rivalries would stand in the way of world domination by the United States. It is only the posing of a hostile capitalism which unifies the forces now gathered in the name of communism under dictation from the Kremlin. Civilization's great question is whether it will accommodate itself to a measure of central world government, by dictatorship, democracy, or a combination of the two, before it destroys itself through modern methods of warfare.

LIBERTY AND JUSTICE IN TIME OF WAR

Regimentation of the Home Front. As already indicated, war drastically curtails the normal rights and liberties of civilians. Rights of private property are drastically subordinated to the public welfare. One cannot buy whatever one wants at prices the parties can agree upon. The uses to which property is put may be sharply restricted. As an exercise of its war powers the federal government during World War II even established speed limits for passenger automobiles in order to conserve tires. As a means of community protection, government curtailed the display of lights at night and provided for total blackouts when needed. Although bombs have not yet been dropped on American cities, this danger was provided against by civilian groups in all important cities to fight fires and take care of the injured. In any future war with the use of atomic bombs in prospect, the United States must prepare and indeed presumably is already preparing for the simultaneous destruction of large parts of many big cities, wholesale deaths in some of those cities, and the complete disruption of all forms of communication and transportation, water, sewage, and fire-fighting facilities, and pollution of the air for miles around by atomic radiation. Such eventualities call for immense and highly flexible civilian organization. Even with the best of planning it is clear that the chaos would be appalling, and that in coping with it all survivors would have to play an active part.

Censorship. There are important problems in wartime in the field of communications. It is necessary that the right information get to the right place at the right time. The American people, their allies, neutrals, and even the inhabitants of enemy countries need to be given information which will put our war effort in the proper light. Because of the value we place

on freedom of communication, freedom of speech, press, and radio must not be unnecessarily restricted. Yet to the greatest extent possible the enemy must be kept in ignorance of American military strategy, of the movement of troops and materials, and of other facts which might be helpful to him. During both world wars, the United States has set up governmental machinery to give out selected information. Such machinery in World War II was centered primarily in the Office of War Information. Likewise during both wars it set up machinery for censorship, concentrated in the Office of Censorship in World War II. The personnel of government departments having information of value to the enemy are carefully scrutinized, and restrictive rules on giving out information are prescribed. Instead of censoring newspapers and radio in great detail, the Office of Censorship prescribed and secured general observance of what it called voluntary censorship. This scheme worked well. The press carefully ignored troop and ship movements, the construction and operation of plants for atomic energy, and even the tours of inspection of war plants made by President Roosevelt. The enemy may have found ways to get information withheld from the American people, but it was not gotten from the press.

Always sensitive to criticism of their own conduct, government officials have in wartime the added excuse for resentment that criticism of the government impairs morale and interferes with the war effort. Yet apart from the question of constitutional guarantees of freedom of speech and of the press, there is disciplinary value in exposing administrative and bureaucratic arrogance, mismanagement, and futility wherever they are found, and in permitting public display of indignation at military incompetence which results in the loss of American lives. An exceedingly fine line must be drawn between permissible criticism and seditious attacks. The Supreme Court, in a case which had its beginnings during World War I, attempted to draw the line by the concept of "clear and present danger," arguing that the constitutional right to freedom of expression ends where speech or publication creates a clear and present danger of bringing about some evil which Congress has the power to prohibit.[9] The determination of what constitutes such a clear and present danger, however, is no easy task. Apart from the constitutional question, it is significant that during World War II coping with seditious utterances was no serious problem. War sentiments were so nearly unanimous that there was little public criticism with a seditious tone.

Enemy Aliens. Civilian enemy aliens in the United States in time of war are usually not disturbed. Like other aliens, they are required to register with a government agency. They may be forbidden to reside in particular areas or to work in certain types of war production, but along with other workers they are usually needed in civilian employment and their services are welcomed as long as they attend strictly to their business. The few who are suspected of being enemy agents, on the other hand, are usually in-

9. See *Schenck* v. *United States*, 249 U.S. 47 (1919).

terned for the period of the war. Of those from enemy countries who are suspected of being enemies, only those retain their freedom who, as a part of their strategy, have become citizens of the United States and whose connection with enemy countries is not proved sufficient to justify punishment under some statute or to secure nullification of citizenship on the ground that it was secured by fraud.

Members of enemy armed forces who enter the United States by land, sea, or air may expect to be treated according to the law of war, with such protections as the law provides for men in uniform when taken prisoner. When such persons enter the United States secretly, however, and not in uniform, they forfeit the protection to which prisoners of war are entitled. In World War II the Supreme Court upheld the power of a military commission to try and sentence to death enemy saboteurs who had come into the United States in this fashion.[10]

Japanese-Americans. During World War II the United States had one type of experience which refused to conform exactly to any of the established rules. In the Pacific coastal states lived several thousand members of the Japanese race. Most of them had been born in the United States and were therefore citizens. Whereas the United States has long recognized the right of expatriation — the right of a citizen of one country to dissolve his allegiance and become a citizen of another — Japan had never completely accepted that doctrine. Rather, it claimed permanently as its own citizens all people born within Japanese jurisdiction and even their children born abroad. With the United States and Japan at war, there was no way of telling just where the allegiance of Japanese-Americans lay. Furthermore, it was suspected that subjects of the Emperor of Japan who had no claim at all to American citizenship were concealed among the loyal American citizens of the Japanese race. The Pacific coast was highly vulnerable to attack. Protection had to be given speedily without taking time to examine the credentials of all persons who might possibly be Japanese agents. Reluctantly, therefore, the government restricted the activities of all persons of the Japanese race who lived in the danger zone.

The restrictive action was taken by military commanders on the basis of orders from the President authorizing them to prescribe military areas and exclude any or all persons from them. They first issued a curfew order requiring persons of Japanese ancestry to remain within their places of residence between eight o'clock at night and six in the morning. The Supreme Court, quoting Chief Justice Hughes to the effect that the war power of the national government was "the power to wage war successfully," upheld the regulation. It found that the challenged orders were defense measures for the avowed purpose of safeguarding the military area in question at a time of threatened air raids and invasion by the Japanese forces. It took into account the peculiar racial situation on the west coast and noted that "Congress and the executive, including the military com-

10. *Ex parte Quirin*, 317 U.S. 1 (1942).

mander, could have attributed special significance, in its bearing on the loyalties of persons of Japanese descent, to the maintenance by Japan of its system of dual citizenship." [11] At a later date, with three justices dissenting, the Court upheld a more drastic military order which required the complete evacuation of American citizens of Japanese ancestry from certain areas.[12]

The government went beyond mere evacuation, however, and provided for detention in what were called relocation centers. Although the prisoners were well treated and the relocation camps bore no resemblance to the concentration camps of Germany, the idea of detaining in this fashion large numbers of American citizens who had committed no offense was grossly inconsistent with our constitutional tradition. It is said that

> By early summer of 1942 the 70,000 west coast Nisei had reached what was probably the lowest status that any group of American citizens of comparable size has ever experienced. They had been removed from their homes by army fiat. They had been placed in government-operated camps surrounded by troops and watchtowers. They had lost, temporarily at least, practically all freedom of movement and practically all opportunities of engaging in private employment and earning anything more than a subsistence livelihood. On June 17, they were officially declared, "except as may be authorized in special cases," unacceptable for service in the armed forces.[13]

The ten detention camps were located in Arizona, Arkansas, California, Colorado, Idaho, Utah, and Wyoming. The peak populations ranged from approximately 8,000 to approximately 18,000 each, and included more than 120,000 persons. More than 50,000 were eventually relocated on the Pacific coast, and a similar number was sent to other parts of the United States and to Hawaii.[14] It was only after the military situation was well in hand that a case involving such forcible detention was decided by the Supreme Court. The majority of the Court avoided the question of constitutionality, but held that the detention had been invalid because it exceeded the powers given in the statute on which the governing authorities relied.[15]

It is now apparent that the Japanese-Americans were victims of local prejudice, local politics, military mismanagement, and other evils.[16] They were members of the race that had surprised us at Pearl Harbor and humiliated our Army and Navy by disclosing their unreadiness for attack. Being orientals, they did not look like "other people." They were, in the language of other years, "unassimilable." Whatever the Constitution said about their right of citizenship, they did not seem to "belong." Hence we discriminated against them as few people thought of discriminating against American citizens of German or Italian origin. On the whole we have no reason to be proud of our performance.

11. *Hirabayashi* v. *United States,* 320 U.S. 81, 97 (1943).
12. *Korematsu* v. *United States,* 323 U.S. 214 (1944).
13. Department of the Interior, War Relocation Authority, *WRA, A Story of Human Conservation* (Government Printing Office, 1946).
14. For figures see *ibid.,* pp. 196–97.
15. *Ex parte Endo,* 323 U.S. 283 (1944).
16. See Morton Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation* (Chicago: University of Chicago Press, 1949).

Treason. Treason rears its ugly head in every major war, and violates all those loyalties to one's own people which citizenship implies. It constitutes betrayal of one's country to the enemy in time of war. It has always been severely punished; yet its definition and punishment have had to be carefully restricted to keep parties in power from punishing for treason persons against whom there is no adequate proof or whose real offense is not disloyalty but merely criticism of particular officers and agencies. Because of the dangers of abuse, the framers of the Constitution included in Article III, Section 3 the following provisions:

> Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.
>
> The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

Treason during the Civil War had a kind of hybrid character which was the product of the confusion of loyalties produced by the North-South conflict. People with a measure of loyalty to the Union were loyal also to their native states and to the people of their home communities even when those states and communities seceded. Because of this tragically understandable division of sympathies, juries refused to convict for treason when the death penalty was prescribed, and Congress found it necessary to set lighter penalties. During both world wars treasonable activities were much less in evidence. Because of the difficulty of securing convictions under the constitutional restrictions quoted above, it was often easier to punish for sedition, violation of espionage legislation, or some other offense. In one treason case in World War II the Supreme Court set aside a conviction for treason, demonstrating as it did so the rigidity of the constitutional requirement of two witnesses to the same overt act.[17]

In January, 1950, it was stated by J. Edgar Hoover, director of the FBI, that

> Since the close of World War II, seven American citizens who committed acts of treason outside the United States have been tried and convicted in American courts as a result of our investigative efforts. We have had sentences imposed totaling one death, two life imprisonments, 85 years, and fines of $50,000.[18]

Other cases were still pending. Some of the more notorious treason cases involved women — "Axis Sally" and "Tokyo Rose," who from Germany and Japan had broadcast radio programs to American fighting men to create

17. *Cramer* v. *United States,* 325 U.S. 1 (1945). For an instance of a conviction upheld involving a similar question, however, see *Haupt* v. *United States,* 330 U.S. 631 (1947).

18. *Department of Justice Appropriations for 1951,* Hearings, House Committee on Appropriations, 81st Cong., 2d. sess., p. 236. It seems that the one death sentence was commuted to life imprisonment. As of 1950 the United States had never executed the sentence of death for the crime of treason.

discontent and destroy morale. Each of them was sentenced to imprisonment for ten years or more and fined $10,000. Lest it be thought that the government profited out of the misery of convicted traitors, however, it should be noted that according to Attorney General McGrath the Tokyo Rose trial cost $75,000 in addition to the costs of operating the courts and the FBI, and the Axis Sally case $50,000.[19] One analyst of the traitor group says that they include professional traitors who are disloyal for a price, naturalized citizens whose loyalties were never really transferred to the United States, "crackpots," and "ideological traitors, the educated, sophisticated thinkers, mostly disillusioned with the philosophy of the West."[20] In view of the size of our population, the number of identified traitors is probably no larger than might be expected, although there would be many more if the constitutional definition of treason included the motley crew of dissidents who demonstrate greater loyalty to the Soviet Union than to their own country. Except in time of war, these people can be reached only by statutes based on other provisions of the Constitution.

Military Trials for Civilians. The practice of civilian trials for civilian offenses, with the many safeguards of jury trial and due process of law, is deeply entrenched in the Anglo-American legal system. The right of summary trial of military offenders in courts martial is recognized, and also the right of military trial of civilians in the midst of war situations where the civil courts are not functioning, but any encroachment of the military upon civil jurisdiction is regarded as dangerous. In an important Civil War case, the Supreme Court held that military trials for civilians could not be constitutionally prescribed in areas which were not in the theatre of war and where the civil courts were open and were uninterrupted in the exercise of their jurisdiction.[21] At the close of the Civil War, Congress provided temporarily for military governments in the southern states; aware, however, of the doubtful constitutionality of an arrangement which substituted trials by military commissions for trials by courts patterned after the common law tradition, it abolished that portion of the appellate jurisdiction of the Supreme Court which would have given the Court the power to pass on the constitutional question.[22] The so-called Reconstruction Acts of the post-Civil War period therefore ran their course without passing the test of constitutionality.

Since no American territory was near the theatre of war in World War I, no question arose of military trials for American civilians. Our entrance into World War II, however, was punctuated by the dropping of Japanese bombs on Pearl Harbor, precipitating there a regime of military control of civilian life. It was widely feared that the Hawaiian Islands might suffer

19. *Ibid.*, p. 7.
20. Gertrude Samuels, "American Traitors: A Study in Motives," *New York Times Magazine*, May 28, 1949, p. 17. See also Nathaniel Weyl, *Treason* (Washington, D.C.: Public Affairs Press, 1950).
21. *Ex parte Milligan*, 4 Wallace 2 (1866).
22. *Ex parte McCardle*, 6 Wallace 318 (1868).

other attacks and that enemy agents might engage in sabotage. On the basis of the organic act of the Territory of Hawaii, the act of Congress by which the territorial government was established, the governor immediately proclaimed martial law — an inadequately defined term which permits government by the military — and suspended the privilege of the writ of *habeas corpus.* Virtually at his invitation, the commander of the United States military forces in Hawaii proclaimed himself military governor and announced that he had taken charge of the government of the territory. He proclaimed preservation of order by the troops under his command and declared that "offenders will be severely punished by military tribunals or will be held in custody until such time as the civil courts are able to function."

Order was speedily restored after the Japanese attack and the civil courts were allowed to open for certain purposes, but military courts continued to try civilians for various offenses. The sentences imposed by the military courts were not subject to review by civil courts. As late as August 25, 1943, well over a year and a half after the attack on Pearl Harbor, military orders "prohibited even accepting of a petition for writ of *habeas corpus* by a judge or judicial employee or the filing of such a petition by a prisoner or his attorney. Military tribunals could punish violators of these orders by fine, imprisonment, or death." [23]

It was not until October 24, 1944, that martial law was terminated by presidential proclamation and the privilege of the writ of *habeas corpus* was restored. Among the offenders then imprisoned as a result of military decisions was a man who had been tried by a military court in 1942 for embezzlement which had no connection with the military forces, and a civilian ship fitter who had engaged in a brawl with two armed marine sentries at the navy yard. When in 1946 cases involving these prisoners reached the Supreme Court, it ordered their release, holding that the power to declare martial law did not include the power to supplant civilian laws by military orders and to supplant civil courts by military tribunals where conditions were not such as to prevent the enforcement of law by the civil courts. Said the Supreme Court,

> Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. . . . Our system of government is clearly the antithesis of total military rule and the founders of this country are not likely to have contemplated complete military dominance within the limits of a territory made part of this country and not recently taken from an enemy. They were opposed to governments that placed in the hands of one man the power to make, interpret, and enforce the laws. Their philosophy has been the people's throughout our history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments. We have always been especially concerned about the potential evils of summary criminal courts and have guarded against them by provisions embodied in the Constitution itself. . . . Legislatures and courts

23. *Duncan* v. *Kahanamoku,* 327 U.S. 304, 309 (1946).

> are not merely cherished American institutions; they are indispensable to our government.[24]

Expansion of the military power into the area of civil power almost always comes in time of crisis when civilians as well as military men are more concerned about the preservation of order than of traditional rights. The military come in — or are invited in, as in the instances of Hawaii — and remain too long and exercise too much power in too arbitrary a fashion. Civil courts, with the Supreme Court as the final spokesman, may eventually have an opportunity to redefine the boundary between civil and military jurisdictions, but usually the redefinition comes only after the damage has been done. At best, as illustrated by the Hawaiian experience and by the handling of Japanese-Americans on the west coast, the military can be kept in its place only if civilians keep their heads and refrain from urging and approving the expansion of military power beyond the limits which cool-headed and clear-thinking people believe necessary.

WAR AND THE RULES OF WAR

The purpose of war today is to destroy the armed forces of the enemy, his military equipment, factories, and transportation system, to create chaos within his country and break his civilian morale — all to the end that he shall be forced to surrender. Even for waging war, there are international rules of the game which outlaw some of the grosser military practices. The slaughter of prisoners, the poisoning of the water supply, the use of poison gas, the calculated slaughter of civilians — these and other inhuman practices are generally regarded as beyond the pale — even though in recent wars all of them have apparently been practiced to some extent. But even if these restrictions are scrupulously observed, the fact remains that the aim of war is to destroy or subjugate the enemy. War is the display of raw force, and its success measured by slaughter and destruction or, at best, by the capture of the armed forces, territory, and property of the enemy. Only after the war is over can one of the parties — the victor — fully examine what violations of the rules of war have taken place. Then comes the time to redefine the rules and punish the war criminals. Outstanding in this field were the trials held at Nürnberg, Germany, and in Tokyo after the close of World War II.

The Nürnberg Trials. However great the suffering and disaster produced by major wars in modern times, the political and military leaders responsible for starting them and carrying them on have usually escaped punishment. Napoleon Bonaparte was penalized only by exile under guard. The president of the southern Confederacy was imprisoned for a time and held for trial, but neither he nor the other political or military leaders of the Confederacy were actually tried. Deposed kings and emperors have usually found asylum in other countries as have the defeated parties in the in-

24. *Ibid.*, p. 322.

numerable revolutionary uprisings in Central and South American countries. Although during World War I "hang the Kaiser" became a slogan among allied peoples and there was much talk of bringing German leaders to justice, after the war the Kaiser was permitted to find a comfortable home in the Netherlands and the punishment of German war criminals was by compromise left to the German courts where it proved largely a farce.

The ruthlessness and gross brutality of the Axis leaders during World War II and their utter disregard of principles of right and justice and of international law, and the resentment against them for turning the world once more into a sea of blood, made it inevitable that they get off less lightly. Benito Mussolini, the one time bombastic Duce of Italy, was shot down by his own people and his body hung by the heels beside that of his dead mistress. Dreading capture by the Russians, Hitler, as far as we know, committed suicide beneath the ruins of Berlin. Some of his immediate subordinates took their own lives. Others attempted to escape in disguise but were captured along with still others who made no such attempt.

Many among the victorious peoples of the United Nations recommended summary justice before a firing squad for Hermann Goering and other Nazi leaders. Some believed, however, that fair trial and punishment of these international criminals might strengthen the authority of law and so deter other power-hungry individuals and groups in later times. In May, 1945, President Truman appointed Robert H. Jackson, associate justice of the Supreme Court of the United States, as a representative to negotiate with the principal allied powers for establishment of an international military tribunal to try the major European Axis war criminals. He also appointed Jackson United States chief counsel for prosecution in the proposed court. The British, the Soviet, and the French governments likewise appointed representatives. A charter for the tribunal was drafted, based on principles and practices of law from the legal systems of the four countries. An indictment was then phrased by the prosecutors charging twenty-four defendants and seven organizations with conspiracy to wage aggressive war, breaches of international peace, violation of rules of warfare, and wholesale crimes against humanity. The defendants were brought to trial at Nürnberg, Germany, in November, 1945.

The trial occupied 216 court days, ending in a judgment delivered on September 30, 1946. Carried on before judges of the four countries, it achieved widespread publicity. Records were made in English, German, French, and Russian. Extensive testimony and huge quantities of records of the behavior of the defendants provided an overwhelming record of German war guilt. The difficulty with the trial was that the crimes with which the defendants were charged were not specifically outlawed under any rules of law which the court had the jurisdiction to apply. Slowly over centuries, courts of the common law tradition have evolved rules and principles of law for punishment of particular offenses without necessary support from legislative action. The International Military Tribunal was organized partly on the theory that, by the operation of courts in the interna-

tional field, principles and practices of law applicable to international behavior could be developed after the fashion of the common law. The prime difficulty of the task of the new tribunal lay in the fact that it was being asked to do within a single trial and series of decisions the kind of thing that common law courts had done most gradually through numerous decisions over centuries. Because of the comparative abruptness of its action — a matter of weeks rather than of decades or centuries — the court's law-making decisions took on somewhat the aspect of an act of legislation prescribing punishment for offenses already committed. Legislation of this kind is unpopular in the Anglo-Saxon tradition, and is forbidden by our constitutional prohibition of enactment of *ex post facto* laws.

To cynical observers of the Nürnberg trials, the process appeared to be little more than a masquerade for condemnation of the vanquished by the victors. Some critics warned that the proceedings had dangerous implications for the future, in that later victors would feel justified in condemning other defeated leaders — conceivably our own.

To others, however, the Nürnberg trials, which resulted in death sentences for twelve of the defendants and prison sentences for seven others, marked the beginning of internationally accepted rules of law forbidding aggressive war, crimes against humanity of the sort proved against the Nazi leaders, and other offenses. It remains for the future, perhaps the quite distant future, to determine whether or not the Nürnberg trials did anything toward achieving their long-range purpose.

The Tokyo Trials. The trial of other German war criminals than the top leaders tried at Nürnberg was left to the military governments set up in the respective areas. In Tokyo, trials of the highest Japanese leaders were conducted in a tribunal patterned after that at Nürnberg, though with important differences. Whereas under the spotlight of world attention each of the countries participating in the Nürnberg trials were represented by able and well-known men, the several countries and the people generally paid less attention to proceedings in Tokyo. By contrast with Justice Jackson who played the leading part for the United States in planning the Nürnberg prosecutions, the American in the comparable position in Tokyo had less ability, less vital interest in establishing principles of law, and less respect from his associates. Although in Tokyo as in Nürnberg arrangements were made to provide counsel for the accused, the arrangements were so inadequate that six American defense attorneys resigned in protest.[25]

The proceedings dragged out, but they resulted in the latter part of 1948 in the death sentence for Premier Hideki Tojo and his associates. Certain of the defendants appealed to the Supreme Court of the United States; but they were denied a hearing on the ground that the tribunal in Tokyo was an agency of the allied powers, not one of the United States over which the Supreme Court could exercise jurisdiction.[26] Although the decision was

25. See the letter of Valentine B. Deale, *New York Times*, December 19, 1948.
26. *Hirota* v. *McArthur*, 338 U.S. 197 (1948).

undoubtedly correct, the Tokyo trials, perhaps even more than those at Nürnberg, created in the minds of the American people a sense of discomfort and a feeling that their real purposes had not been adequately achieved. The offenders were punished as they presumably deserved, but it was not clear that the trials had done a great deal toward establishing beneficent legal principles and practices.

American Trial of Enemy Officers. In their conduct of war, Japanese forces treated prisoners with gross brutality whether military or civilian, and utterly disregarded the laws of war with respect to persons and property in occupied areas. Americans promised retribution for this unwarranted torture, slaughter, and destruction. As soon as victory was won, military tribunals were set up in the Philippines to try the leading offenders. The most notable of the defendants was General Tomoyuki Yamashita, who was in command of the Philippines at the time of the Japanese defeat. The General was accused of permitting his soldiers "to commit brutal atrocities and other high crimes against the people of the United States and of its allies and dependencies, particularly the Philippines." He was tried before an American military commission and sentenced to death, and the Supreme Court held that the government had acted within its powers in bringing the General to trial in this fashion. Two justices dissented, however, and one of them, Justice Murphy, phrased as follows the sense of discomfort felt by large numbers of the American people:

> A military commission was appointed to try the petitioner for an alleged war crime. The trial was ordered to be held in territory over which the United States has complete sovereignty. No military necessity or other emergency demanded the suspension of the safeguards of due process. Yet petitioner was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged. In all this needless and unseemly haste there was no serious attempt to charge or to prove that he committed a recognized violation of the laws of war. He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge. This indictment in effect permitted the military commission to make the crime whatever it willed, dependent upon its biased view as to petitioner's duties and his disregard thereof, a practice reminiscent of that pursued in certain less respected nations in recent years.[27]

The point is not merely that in trying the General before a military commission and sentencing him to death the United States had patterned its conduct after that of the enemy. It is rather that the harshness of military justice, combined with the spirit of revenge which inevitably tinges postwar schemes for punishment of the vanquished, failed to convey the assur-

27. *In re Yamashita,* 327 U.S. 1, 27–28 (1946).

ance of rightness which is necessary if people in general are to be convinced that justice has been done according to law. There is no doubt that the world needs a body of law to prevent aggressive warfare and adequately provide for the punishment of political and military offenders who start or wage war in violation of principles in which people believe. But law which is created by the victors after the offense, or enforced only by the victors in the atmosphere of the victory itself, is not likely to win the confident support of thoughtful people.

THE OCCUPATION OF ENEMY TERRITORY

Land warfare usually takes place in areas lived in by civilian populations. Even if military steamrollers crush out civilian life in the immediate theater of war, people continue to occupy the surrounding cities and countryside. Humanitarian invaders, and those who would win the friendship or divide the sentiments of the invaded country, attempt to reestablish law and order, the flow of necessary civilian supplies, and the sanitary conditions necessary for civilian survival. During World War II the United States made extensive plans for military government in areas which it expected to capture and carried the plans into effect as our military forces advanced. How important this activity was in the whole scheme of things we do not yet know. It has received considerable attention from academic people, whether because of its basic importance or because of a kind of professional self-interest deriving from the fact that many of them took part in it.

American Military Government. Early in the war the government established at Charlottesville, Virginia, a school of military government to train officers for administration of captured enemy territory. For officers and men at the lower levels, the training program was later expanded to include a number of other institutions. It was realized that initial chaos would prevail in territory which had been overrun by opposing armies and in which not only property and transportation facilities but community services and governmental organization would have been destroyed. It was also seen that governing techniques would have to be adapted somewhat to the customs and beliefs prevailing in different areas. Between governing an Italian town and a German one there might be little in common. There would be even less in common between European communities and communities of the Orient. Trainees were therefore schooled to deal with the types of emergencies likely to arise in a given area, and were also acquainted with local customs, conditions, and languages. American military government personnel moved forward with the armed forces and took charge of local government as the fighting forces went ahead. In North Africa, Italy, France, Germany, the Japanese islands, and other areas, military government personnel, in uniform but not trained for combat, took over responsibility for the reestablishment of local government. They adjusted their operations to local customs, they utilized the local men and

women of prestige in the community, they wielded whatever was necessary in the way of American military authority, and they sought to weave into administration some ideas and practices which were largely American.

In the enemy countries, military occupation continued long after the end of the war and in important areas it still continues. Military government officials, acting with fighting troops in occupation, continued their efforts to reestablish order, segregate and punish military and political elements responsible for the war, dismantle war industries, and collect reparations. A prime purpose of the original leaders of military government was to teach democracy in the occupied areas and attempt to institute democratic practices in government, under the assumption that only through democracy can wars be averted. It has been said that

> American foreign policy has consistently maintained democratization of Germany and Japan as one of its major objectives in dealing with the defeated nations. In fact, democratization constitutes the major constructive aspect of American policy, the major components being negative. Demilitarization, denazification, and deindustrialization were, of course, held to be essential conditions of democratization, but their purpose was obviously to eliminate obnoxious features of German and Japanese society, to wit: militarism, fascism, and the industrial war potential.[28]

The democratization program cannot yet be fairly appraised. It did a great deal initially to prevent domination of enemy communities by Nazis, Fascists, and others who had been responsible for the war. It was largely this program that demonstrated a vast difference between Americans and most other occupying forces. Unfortunately for the program, however, the original military government leaders who brought to it a measure of idealism returned to academic halls and other civilian employments immediately after the war, leaving matters in the hands of less distinguished and more conventionally military-minded people. It is questionable whether the military, the least democratic of all groups in our society, is well fitted to teach democracy to dictatorship countries. It is true, however, that even the military is to some extent affected by the influences of democracy, and that the contrast between the military forces of dictatorships and democracies may itself be something of a revelation to the occupied countries. Furthermore, since there must be something in common betwen the teacher and the taught if education is to proceed, there may be value in having our military maintain the contact with traditionally militaristic peoples.

Appraisal of military government is hampered also by a distortion of purpose which came about after the end of the war. With our allies we set about the occupation expecting to achieve certain rather specific ends and then return the governments to their own peoples. Gradually, however, occupation became an instrument of the "cold war" between the western countries and the Soviet Union. While both groups talk in terms of democracy, each insists on its own definition of it, or refuses to define it and

28. Carl J. Friedrich, *American Experiences in Military Government in World War II* (New York: Rinehart, 1948), p. 3.

tacitly identifies it with its own forms of government. Because military occupation became an instrument of military alignment separating the two groups, we were not able promptly to surrender jurisdiction over former enemy territory to the Department of State or other civilian agencies which might normally be expected to take the lead in foreign policy matters.

The Occupation of Germany. Although there have been significant aspects in the occupation of each of the several countries, adequate illustration can be provided by discussion of the occupation of Germany, Japan, and Korea. Germany was divided into four occupation districts, allocated to the United States, France, Great Britain, and the Soviet Union. Berlin, the German capital, though well within the Russian zone, was by agreement among the four powers designated as the seat of a four-power council which was to supervise policy for the government of Germany as a whole. From the beginning each of the occupying powers exercised a great deal of autonomy. Each made extensive use of its own governmental method and took its own national interests much into account.

From the beginning the four power council in Berlin ran up against conflicting and divergent interests, ideologies, and methods. Endless discussions yielded little more than stalemate, and the council became less and less important as a governing body. A major difficulty was the inability to establish a sound German currency good in all zones. The western powers finally established a uniform currency which the Russians refused to accept, and at this point, early in 1948, virtually all semblance of four power cooperation was abandoned. The Russians, contending that the other three powers had no satisfactory reason for remaining in Berlin now that the council had ceased to exist, attempted to force them out by cutting off all ground transportation. Rather than suffer the loss of prestige which would be involved in being starved out of Berlin, the United States built up a huge air transport fleet to supply our occupation forces and the German population in the non-Russian zones of Berlin with food and other necessities. The "airlift" operated as the sole means of transportation into and out of Berlin from June, 1948, until May, 1949, when railroad and truck traffic was resumed.[29]

The Government of Western Germany. By a series of steps the three western powers brought together the administration of their occupation zones, and in 1948 a German constituent assembly was permitted to form a constitution, or Basic Law as it was called, for the states included in the three zones.[30] The parliamentary government established by the Basic Law was called a Federal Republic. To it was transferred in large part the administration of local affairs, while the administration of economic aid was turned over to the Economic Cooperation Administration, without, however, the withdrawal of occupation forces. In attempt to deal with

29. See the *New York Times,* May 12, 1949.
30. For a copy of the Basic Law see the *New York Times,* May 9, 1949.

complicated economic problems without rebuilding Germany as an industrial and military power, the Ruhr was set aside for independent international administration.[31] In a further attempt at solution France proposed in May, 1950, that the major coal and iron industries of western Europe be pooled under a mechanism for unified control, in the hope that productive energies could be released and integrated without invitation to future war among the western powers.[32] The proposal was still under discussion as this book went to press.

Germany has been in part the victim and in part the beneficiary of the rivalry between the Soviet Union and the western powers. As a victim it has been torn apart, with its eastern and predominantly agricultural area hidden behind the iron curtain and its western and predominantly industrial area within the sphere of western influence. As a beneficiary its western area is being restored to something approaching normal production in the hope that it may serve as a buffer state against the Soviet Union. While it has not yet been permitted to re-arm, it seems only a matter of time before the western powers will let it do so under some arrangement that enables them to terminate or reduce their expensive military occupation. The scope of further benefits to western Germany is yet to be determined. Not until after the occupation shall we be able to tell how much remains of the powerful and highly cartelized business organization which has been at the base of German military and political power and aggressiveness.

The Occupation of Japan. The occupation of Japan has differed somewhat from that of Germany. We entered the mainland of Japan only after the war had been won. The forces of the Soviet Union never got entrenched there. Although the occupation is nominally under the direction of a Far Eastern Commission of United Nations, it is controlled by General Douglas MacArthur, who tolerates no communist interference. Somewhat the same forces are at play in Japan, however, as in Germany. In the Far East as in the West we are concerned with curbing Soviet expansion. From the expectation of compelling Japan to pay extensive reparations we have turned to a program of rebuilding its economic strength and are spending millions of dollars in support of the program. Although, unlike Germany, Japan is not being torn apart by rival occupying forces, the occupying authorities are finding it difficult or impossible to make Japan self-supporting. The economic problem goes much deeper than the war and the occupation itself. A major cause of the war, indeed, was the belief of Japanese leaders that their country must have more territory, more resources, and wider markets in order to prosper. A devastating military defeat only accentuated an existing economic crisis, through waste of resources, loss of outlying possessions, and loss of Korea and Manchuria. The occupation forces have reduced the Japanese throne from an absolute to a limited

31. For a draft of the Ruhr Agreement see the *New York Times,* December 29, 1948.
32. See Paul G. Hoffman, "Toward Integration: France Points the Way," *New York Times Magazine,* May 21, 1950.

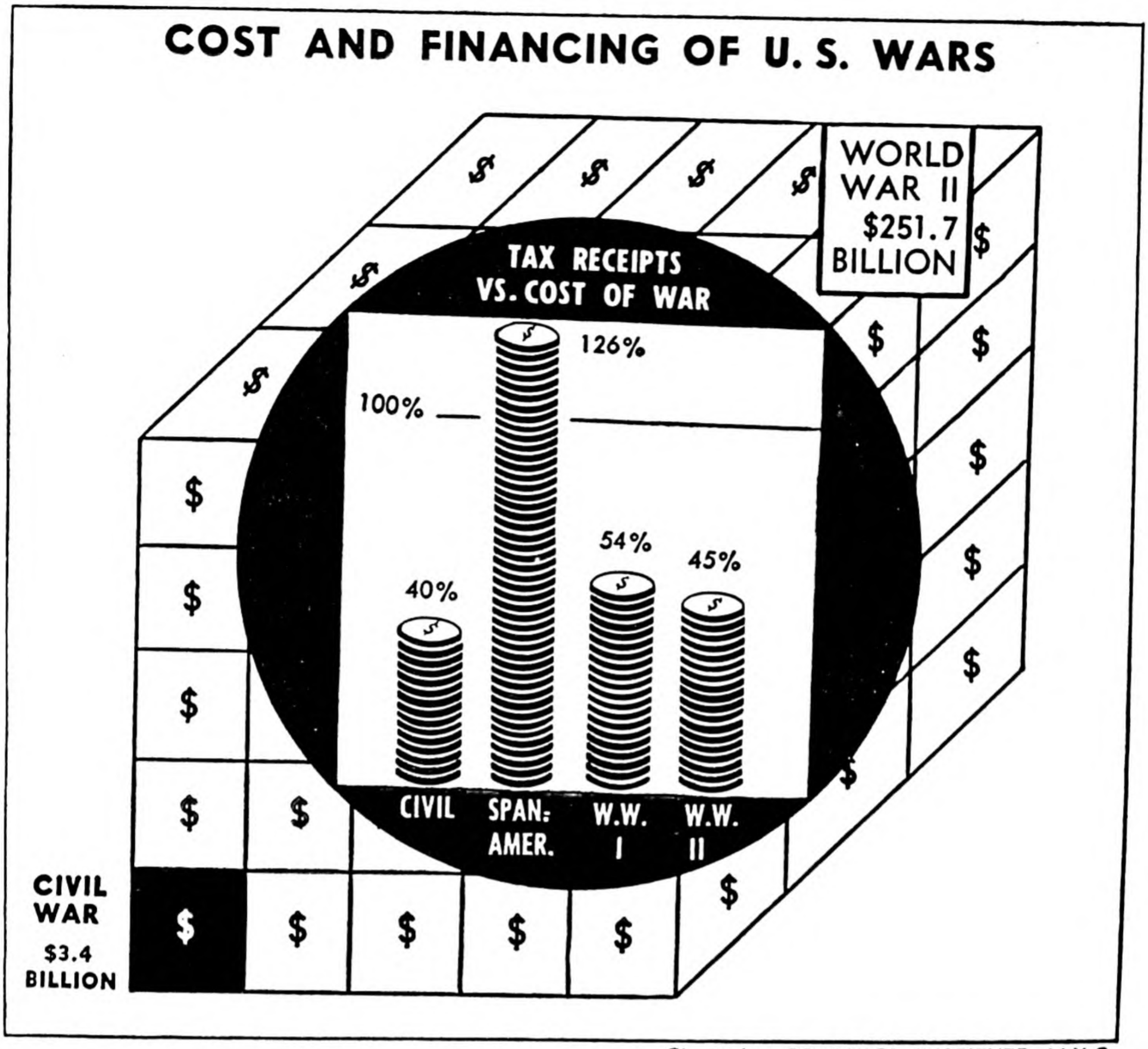
monarchy. They have instituted democratic forms of government. They have reduced the tremendous power of an oligarchy of wealthy families. Japan would like to make peace and resume relations as a friendly power. Here as in Germany, developments are conditioned largely by the cold war with the Soviet Union.

The Occupation of Korea. Like Germany and unlike Japan, the territory of Korea, a huge Asiatic peninsula whose natives had for a number of years been dominated by Japanese occupants, was divided between occupying powers. The northern part of the peninsula which attaches to the mainland was allotted to the Soviet Union and the southern part to the United States. Here, as in Germany, a sharp line was drawn between the two regions. Yet unfortunately the regions are physically dependent one upon the other. The North needs the food and other agricultural products in the South, and the South needs the electric power and other raw materials produced in the North. The Soviet Union established a communist government supported by communist armies in the northern section and then at least nominally withdrew from occupation. The United States set up a nominally democratic government which was recognized by the United Nations. Although concerned about communist military forces from the North, we gradually withdrew most of our troops, only to have to return by land, sea, and air when in the summer of 1950 the communist forces of North Korea made an all-out attack on the South. If on the whole the United States has no reason to be proud of its achievements as an occupying power, the reasons of discontent which loom above all others derive from the chaotic world situation and are not to be attributed to anything unique in the behavior of American occupying forces.

THE IMPACT OF WAR

In conclusion, war may at times be necessary for national survival. As long as the leadership of any powerful nation is predominantly predatory, no other nation can avoid war merely by engaging in peaceful activities and attempting to deal fairly with its neighbors. Aside from defense, war may have certain other allegedly beneficial results. The war situation intensifies patriotism and stimulates national loyalties. It promotes a sense of common interest and demonstrates the values of community action. It yields the values of discipline. It tends to promote governmental efficiency by revealing the weaknesses of old methods and obsolete organizations and giving rise to more appropriate practices and mechanisms. It speeds the development of new techniques of industrial production. For nations which are growing relatively in power and world influence, success in war may speed the process whereby world leadership is attained.

The total cost of modern war, however, is tremendous. The more than $200 billions of our national debt which is attributable to World War II is for most people an incomprehensible figure. Even so the cost of war is not



PERCENTAGE OF COSTS OF WARS TO TAXES COLLECTED

to be measured merely by monetary figures. Millions of lives may be destroyed or shattered. Resources are depleted, human effort is wasted in destruction, peaceable international relations are disrupted, hatred and antagonism breed and remain for generations to come, moral standards are everywhere relaxed or abandoned, and the life of the world community disintegrates and is degraded.

Although no nation with a will to survive can neglect preparation for its own defense, and although a measure of desirable discipline is involved in such defense, the mere preparation for possible war is costly, as is war itself. In the United States, for example, a direct annual outlay of some $15 billions, and indirect outlay of other billions, is not to be taken lightly. The consumption of material and human resources is immense. Serious social implications are involved in the educational and propaganda practices necessary to keep our people and our potential allies aware of the possibility of war. Those who believe in the values of internal freedom and constitutional safeguards against injustice see danger in the growing influ-

ence of military power, with its emphasis on force rather than on liberty and the finer shadings of human justice. Under existing circumstances the expansion of military power may well be a national necessity, but to preserve internal freedom it may be necessary also to civilize the exercise of that power, particularly as it bears upon the internal life of the country.

References

Hanson W. Baldwin, *The Price of Power* (Harpers, 1948).

Bureau of the Budget, *The United States at War: Development of Administration of the War Program by the Federal Government* (Government Printing Office, 1947).

Winston Churchill, *The Gathering Storm* (Houghton Mifflin, 1948).

———, *Their Finest Hour* (Houghton Mifflin, 1949).

———, *The Grand Alliance* (Houghton Mifflin, 1950).

Civilian Production Administration, *Industrial Mobilization for War: History of the War Production Board and Predecessor Agencies* (Government Printing Office, 1947).

Grosvenor B. Clarkson, *Industrial America in the World War* (Houghton Mifflin, 1924).

Lucius D. Clay, *Decision in Germany* (Doubleday, 1950).

Edward S. Corwin, *Total War and the Constitution* (Knopf, 1947).

George Creel, *War Criminals and Punishment* (Robert M. McBride and Co., 1944).

Department of the Interior, War Relocation Authority, *WRA, A Story of Human Conservation* (Government Printing Office, 1946).

Dwight D. Eisenhower, *Crusade in Europe* (Doubleday, 1948).

Merle Fainsod and Lincoln Gordon, *Government and the American Economy* (Norton, rev. ed., 1948).

Charles Fairman, *The Law of Martial Rule* (Callaghan, 2d. ed., 1943).

Wolfgang Friedmann, *The Allied Military Government of Germany* (Stevens & Sons, Ltd., London, 1947).

Carl J. Friedrich and Associates, *American Experiences in Military Government in World War II* (Rinehart, 1948).

David L. Gordon and Royden Dangerfield, *Hidden Weapons: The Story of Economic Warfare* (Harper, 1947).

Morton Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation* (University of Chicago Press, 1949).

Luther Gulick, *Administrative Reflections from World War II* (University of Alabama Press, 1948).

Seymour E. Harris, *Price and Related Controls in the United States* (McGraw-Hill, 1945).

E. Pendleton Herring, *The Impact of War* (Farrar & Rinehart, 1941).

Hajo Holborn, *American Military Government: Its Organization and Policies* (Infantry Journal Press, 1947).

Carey McWilliams, *Prejudice: Japanese Americans, Symbol of Racial Intolerance* (Little, Brown, 1944).

Edwin M. Martin, *The Allied Occupation of Japan* (Stanford University Press, 1948).

Frederick Morgan, *Overture to Overlord* (Doubleday, 1950).

Donald M. Nelson, *Arsenal of Democracy, The Story of American War Production* (Harcourt, Brace, 1946).

James K. Pollack, James H. Meisel, and Henry L. Bretton, *Germany Under Occupation* (George Wahr Pub. Co., Ann Arbor, rev. ed., 1947).

Robert E. Sherwood, *Roosevelt and Hopkins* (Harpers, 1948).
Emanuel Stein, James D. Magee, and W. J. Rovan, *Our War Economy* (Farrar & Rinehart, 1943).
Edward R. Stettinius, Jr., *Lend-Lease: Weapon for Victory* (Macmillan, 1944).
Edward R. Stettinius, Jr. (edited by Walter Johnson), *Roosevelt and the Russians; The Yalta Conference* (Doubleday, 1949).
Phillip H. Taylor and Ralph J. D. Braibanti, *Administration of Occupied Areas: A Study Guide* (Syracuse University Press, 1948).
H. J. Tobin and P. W. Bidell, *Mobilizing Civilian America* (Council on Foreign Relations, 1940).
Nathaniel Weyl, *Treason* (Public Affairs Press, 1950).
Harold Zink, *American Military Government* (Macmillan, 1947).

PART EIGHT ★ *Federal Relations with Lesser Governments at Home*

35

Territories and Dependencies: The Outer Limits of Governmental Power

No oracle or supreme lawgiver tells us what ought to be the range of the power and influence of the United States or the measure of its territory. We have discovered no "ideal" to which the dimensions of the country should conform. In tracing the history of our territorial expansion, with its gradual rounding out at seemingly permanent boundaries, we might infer that nations, as is sometimes said of economies, grow from infancy to maturity, with the assumption that in terms of size the United States is now "mature." So to infer, however, is merely to conclude that whatever is is right, without explaining how or for what reason it came to be so. Developed in various settings, there are manifold rationalizations which pretend to measure, or at any rate to justify, the scope of the authority of a particular government. A nation seeks its "place in the sun." It seeks to realize its "manifest destiny." Great Britain as "mistress of the seas" and head of a colonial empire on which "the sun never sets," assumes the "white man's burden" of civilizing and Christianizing backward peoples throughout the world. Benito Mussolini set out to reestablish the supremacy of his people by recreating the Roman Empire. Adolf Hitler set out to make Germany master of the entire Eurasian "heartland," to establish an empire that would "last a thousand years." With fanatical and ominous naiveté, the Soviet Union seeks to liberate peoples from their capitalist oppressors so that they may enjoy the benefits of communist regimentation.

The United States has had its own sense of mission and has voiced its share of slogans and rationalizations of expanding power, either for increasing its territory or for extending its influence over territory ruled by other governments. At the time of our Declaration of Independence from Great

Britain, the thirteen colonies, or states, had a total area of some 400,000 square miles, which by succeeding steps taken over a little more than a century was increased to more than 3,700,000 square miles. The first step was taken by the treaty of peace following the Revolutionary War, when Great Britain gave up not only the original colonies but additional western territory previously wrested from France to make an over-all total of more than 892,000 square miles.[1] When in 1787 he wrote what became No. XI of *The Federalist*, Alexander Hamilton argued that the United States must take a dominant position in American affairs, partly to nullify the arrogant claims of Europe, who had plumed herself the Mistress of the World and considered the rest of mankind as created for her benefit.

> Let Americans disdain to be the instruments of European greatness! Let the thirteen states, bound together in a strict and indissoluble Union, concur in erecting one great American system, superior to the control of all transatlantic force or influence, and able to dictate the terms of the connection between the old and the new world!

Charles A. Beard has written of American territorial expansion that

> There have been two distinct types of acquisition, each under different leadership motivated by distinct and different conceptions of national interest. The first is continental expansion — the struggle for land to round out the national domain, land to be tilled by free farmers or exploited by planters employing slave labor. It was a type of expansion which blended reasonably well with the background of the then existing world economy; and it was responsible to the political forces of a world engaged in establishing a system of national states. It was introduced into the life of the young nation under the auspices of the Jeffersonian party.
>
> The second is over-seas expansion. It was associated in time and philosophy with the growing recognition of increasing national prestige and power. In turning toward this type of expansion, the nation was following the new economic course of western civilization.[2]

The Beard thesis is that acquisitions for what is now continental United States were primarily for the purpose of expanding American civilization, whereas expansion beyond the continental limits was for the promotion of commerce. The two themes do run through most controversies over the expansion of our territory and influence, but they are not always clearly separate. The Louisiana Purchase of 1803 was brought about by an interest both in some of the more than 827,000 square miles of land added to the United States and in the control of the mouth of the Mississippi for purposes of trade. It is said also that "The South was almost unanimous in its demand for the Floridas, for agrarian, commercial, and strategic reasons."[3] Florida was purchased in 1819, adding another 72,000 square miles to the United States.

1. For a chart of territorial acquisitions by the United States see Ernest L. Bogart and Donald L. Kemmerer, *Economic History of the American People* (New York: Longman's, Green, 1942), p. 855.
2. Charles A. Beard, *The Idea of National Interest* (New York: Macmillan, 1934), p. 51.
3. Julius W. Pratt, *Expansionists of 1812* (New York: Macmillan, 1925), p. 12.

Between 1819 and the annexation of Texas in 1845, we acquired no major territory. We did attempt to protect our dominant position in the Western Hemisphere by the assertion of the Monroe Doctrine. In 1823 President Monroe announced in a message to Congress but directed at rival European powers that the American continents were "henceforth not to be considered as subjects for future colonization by any European powers." Although Monroe was of the party of Jefferson, he was implementing the position of Hamilton as quoted above from *The Federalist*. He asserted that

> With the movements in this hemisphere we are of necessity more immediately connected and by causes which must be obvious to all enlightened and impartial observers. The political system of the allied powers is essentially different in this respect from that of America. . . . We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety.

By this declaration we placed the Western Hemisphere within our "sphere of influence," comparable to the spheres of influence maintained by other major powers in various parts of the world. As against European nations we would exercise in the Western Hemisphere control far beyond the limits of our own territorial borders.

Texas came into the Union in 1845 as part of our agricultural expansion, bringing more than 389,000 square miles of territory. Oregon in 1846 brought more than 286,000. The Mexican cession of 1848 brought more than 529,000, thereby for the most part rounding out the present boundaries of continental United States at more than 3,000,000 square miles, by contrast with the 400,000 of 1776.

After rounding out our contiguous national boundaries we reached out beyond them to acquire Alaska in 1867, Hawaii in 1898, The Philippines, Puerto Rico, and Guam in 1899, American Samoa in 1900, the Panama Canal Zone in 1904, and the Virgin Islands in 1917. After World War II, extensive Trust Territories in the Pacific were placed under our jurisdiction. These acquisitions were not made primarily to extend the American way of life to new areas, but to promote trade and national defense. They were gestures of a business as distinguished from an agricultural civilization. They marked the beginnings of American colonialism resembling that of European nations which had established colonies in the Western Hemisphere largely for their own enrichment. Sugar, tropical fruits, and minerals were more important to us than the native inhabitants of Hawaii, Puerto Rico, and Alaska, although it must be emphasized that as a colonial power on a very small scale — and except for its early treatment of the American Indians — the United States has looked out for the welfare of native peoples far beyond the general colonial custom.

THE CHANGING CHARACTER OF AMERICAN EXPANSION

The shift from contiguous continental expansion to Pacific and Caribbean islands and other distant lands marked a change in the character of our national trends. Our business and defense interests required us to reach out for new possessions without reference to their fitness to harbor the culture of the mainland. On the other hand, direct expansion either northward or southward seemed less vital to our welfare than it had been thought at many times in our history. There were times more than a century ago when it looked as if Canada might be taken if we were able to take it. We gradually learned, however, that lack of sovereign control was no serious impediment to profitable trade with Canada, and that there might be advantages in not having full responsibility for it.

As for territorial expansion southward, the United States has no regret that it failed to heed the siren song of those who would have had us take over Mexico, various Central and South American countries, and Caribbean islands. The native and Latin cultures of those areas are very different from ours. They would not easily assimilate into our cultural and economic pattern. Furthermore, considerable economic penetration and profitable trade has been possible without sovereign control. American-owned and -controlled business corporations producing, selling, and transporting oil, coffee, tropical fruits, and other products have often been able to do as much for United States business interests in Latin-American countries as local governments would be likely to do under the jurisdiction of the United States. The officers of our business corporations, indeed, have at times seemed more powerful than the local governments which claimed sovereignty and which had representation in the United Nations and in the Organization of American States.

Some countries, it is true, have rebelled at domination by our business corporations. Mexico and other countries have expropriated oil interests, showing the same indignation at economic domination from the United States as Alexander Hamilton and his successors showed at European political and economic domination in the Western Hemisphere. We have yielded in part to the Latin-American attitude. Until about 1930 the United States enforced even with troops the payment of debts to other countries and to American business, but it no longer takes such responsibility. It tries to improve relations for the benefit of business and to promote the Good Neighbor Policy generally, and it exerts a tremendous amount of influence through making loans and controlling foreign trade, but it makes little use of the primitive methods of outright force.

As indicated in earlier chapters, a great deal of the influence of the United States in foreign countries beyond this hemisphere is exerted through the spending power. The purpose is at once to develop trade possibilities for American business and to improve our defense. The Marshall Plan and the Atlantic Pact represented our judgment as to our long range interests. Our occupation of enemy countries and the maintenance of troops

in lands formerly victimized by our enemies reflected primarily our defense interests. Our management of so-called Trust Territory in the Pacific, to be discussed farther along, is to be regarded as extension of our power not to make the natives into good Americans but to develop the islands for defense, both for ourselves and for others in the non-communist world.

GRADATIONS OF AMERICAN POWER

The relation of the United States to territory throughout the world changes tremendously as we move outward from the center of control. The gradations, measured in terms of power and of tradition and culture, can be suggested by the following descending hierarchy, although there may be some difference of opinion whether some steps should be higher or lower in the scale.

1. The thirteen original states.
2. The other states in the Union, which legally have the same status as the original thirteen but which lack something in the way of tradition which is shared by the "charter members" of the Union.
3. When Alaska and Hawaii become members of the Union they will create a class of non-contiguous states, of states territorially isolated from the other members of the Union. They too will have equal legal status but their location will set them somewhat apart.
4. Incorporated territories which have been organized in such a way as to indicate intention to make them Union members at some time. As of 1950 only Alaska and Hawaii occupied that position. There may or may not be successors.
5. Organized territories which may retain their territorial status indefinitely, may be retained as states, or may be given their independence. Puerto Rico is the best example.
6. Organized territories which are to be given independence after a period of tutelage — as were the Philippines.
7. Territories which are to be governed and administered for their own development and integrated into our pattern of defense but which are not likely to be liberated or converted into states. Guam and American Samoa are examples.
8. Trusteeship Territory, held under assignment from the United Nations and to be developed for the good of the native populations and of the civilized world, with an eye, naturally, to our own defense and trade during our indefinite period of occupancy.
9. Nations covered by the Monroe Doctrine to the extent that the doctrine still has vitality and which are members of the Organization of American States and the Pan-American Union — the component parts of a hemispheric area.
10. Atlantic Pact nations, which participate with us in a program of defense of the North Atlantic area. The pact represents a curtailment of the independence of each member nation in the interest of all. The United

States as the richest and most powerful member exerts a commensurate influence.

11. Nations such as Canada with whom our economy closely integrates itself even without the aid of the Atlantic Pact and other formal agreements.

12. Nations such as Australia with whom we have diplomatic and trade relations but with whom we share in no regional agreements.

13. Nations such as the Soviet Union with which we have formal diplomatic relations but with which we live at odds in most matters and have little in the way of trade relations.

14. Nations with which we have had diplomatic relations but with which such relations have been broken off, as in the instance of Bulgaria.

15. Governments which we have never recognized, such as that of Communist China.

16. Enemy countries occupied by United States troops, such as Germany and Japan.

17. Countries with which the United States is technically at war — of which at present there are none.

18. Undiscovered and unclaimed lands, as in Antarctica, where explorations continue.

As this enumeration shows, the power and influence of the United States stops at no clearly defined limits. They extend outward via declining gradations to touch all parts of the inhabited world. Yet for purpose of study we do have to make distinctions sharper than the situations seem to justify. Thus in the chapters immediately preceding, we discussed relations of peace and war with other nations, taking into account incidentally the several gradations of our relations to them. As in the chapters which follow, we shall consider the federal relations between the Union and the states which compose it. During the remainder of this chapter we shall discuss the non-state territories which we govern, ranging from those on the way to becoming states to those held only temporarily and without claim to ownership.

UNITED STATES TERRITORIES

Territorial Governments. From the time of the treaty of peace which followed the Revolutionary War the United States has had territory to govern other than that of the member states. Our first legislation for territorial government, enacted by the Congress under the Articles of Confederation as the Northwest Ordinance of 1787, provided for the government of the Northwest Territory, which lay north and west of the Ohio River. It provided for territorial government by a governor and three judges who should be chosen by Congress and who should select other officers and adopt laws subject to congressional veto. When its population reached 5,000 free male inhabitants, the territory could select a legislature of two houses and could send a representative to Congress who would have the right to debate but not to vote. The territory could be divided into not less

than three nor more than five states. When a state had as many as 60,000 free inhabitants — and slavery was forbidden — it might form a government with a constitution and might be admitted to the Union by Congress on an equal footing with the other states. The emphasis of the Northwest Ordinance was on the welfare of the territory to be governed. It was to be part of the Union and not an area for exploitation. It was an emphasis far different from that of most of the world's colonial powers, reflecting continuing American resentment at earlier British exploitation of the American colonies.

Although the system of governing territories had to be changed to conform to the pattern of the Constitution of 1789, it remained fundamentally the same, whether for the Northwest Territory, for the Louisiana Purchase, for the area ceded by Mexico, or for other areas before they achieved statehood. In 1889, as noted by James Bryce, each territory had a governor appointed by the President and the Senate, a judiciary likewise appointed, and a bicameral legislature which was locally elected.[4] The law enforced in each territory consisted of federal statutes and statutes enacted by the territorial legislature — which, however, could not conflict with congressional enactments. Each territory had a delegate in the House of Representatives who was permitted to speak but not to vote. The residents of the territory had no right to vote in federal elections.

Achieving Statehood. It must be remembered, said Bryce, that

> a territory, which may be called an inchoate or rudimentary state, looks forward to becoming a complete state. When its population becomes equal to that of an average congressional district, its claim to be admitted as a state is strong, and in the absence of specific objections will be granted.[5]

As Bryce further noted, however, Congress had absolute discretion in the matter, "and often uses its discretion under party political motives." At the time of the Missouri Compromise of 1820, by which Missouri was admitted as a slave state, an agreement was reached to exclude slavery from other areas in the Louisiana purchase, an issue which stood as a bar to admission of states otherwise ready for it. In spite of the agreement, slavery played a part in action on most territories seeking admission from that time until the Civil War. Thereafter the political complexion of Congress and of the petitioning territories played an important part in most congressional decisions.

On its way to statehood a territory usually first attempts to persuade Congress to pass an enabling act authorizing it to form a constitution as a state. If for some reason Congress is slow to act, the territory may call its own constitutional convention, draft a constitution, and submit it to Congress for acceptance. It is said that fifteen of the twenty-nine former territories entered the Union in that way.[6] Arizona, which became a member

4. See James Bryce, *The American Commonwealth* (New York: Macmillan, rev. ed., 1891), Chapter XLVII.
5. *Ibid.*, p. 556.
6. *Annual Report of the Secretary of the Interior,* 1949, p. 377.

of the Union in 1912, was the final entrant of the forty-eight states which make up the solid continental bloc reaching from the Atlantic to the Pacific and from Canada to the Rio Grande.

As of 1912 it was generally assumed that the roster of the states was complete. In the 1930's and 1940's, however, campaigns were organized for the admission of Alaska and Hawaii. We turn now to those areas, for accounts both of their territorial governments and of the efforts to achieve statehood.

ALASKA

Acquisition and Early History. For more than a century before Russia offered to sell it to the United States in 1867, what is now called Alaska was claimed by Russia and was called Russian America. Unable to make much use of it or to defend it adequately, and perhaps unwilling to see it fall into the hands of a less friendly country, the Czar of Russia opened negotiations with the United States resulting in the purchase of Alaska for $7,200,000. It has an area of approximately 590,000 square miles, part of which reaches well beyond the Arctic Circle. Much of it is a frozen waste, and people who knew little of the agricultural and mineral potentialities of certain regions derisively called it "Seward's ice box" and "Seward's folly," from William H. Seward, the Secretary of State who negotiated the purchase.

At the time of its acquisition by the United States, Alaska was inhabited primarily by a few thousand natives. It remained largely unsettled until around the turn of the century, when the discovery of gold and other resources began to draw a white population, though largely transient. During the first half of the twentieth century our attitude toward Alaska greatly changed. It was found rich in resources far beyond earlier expectations. Although the population, estimated at 135,000 is still highly transient, people in increasing numbers are establishing permanent homes there. Fishing and the fur industry as well as various minerals yield substantial wealth, and agriculture has proved profitable in some areas. Although transportation and communication remain difficult, the development of air transport and radio have made great changes.

Territorial Government. It was not until 1912 that Alaska was given a formal territorial government and the Constitution and federal statutes were extended to it. By the act of 1912 and subsequent amendments, it was provided that Alaska should have a governor appointed for four years by the President with the consent of the Senate, a district court with regional divisions and with judges appointed for the same term and in the same manner, and a locally elected bicameral legislature.

Only to a limited extent, however, did Alaska become self-governing. The activities and the taxing power of the territorial government were restricted, and the federal government continued to make appropriations

toward expenses. As of June 30, 1949, about 99 percent of the land in Alaska was still owned by the federal government [7] and was therefore not subject to territorial control. The Division of Territories and Island Possessions in the Department of the Interior exercised jurisdiction over government land and over other subjects, including a government-owned railroad, the school system, care of the insane, supervision of the rights of natives, and the development of natural resources. The Alaska delegate in the House of Representatives in Washington had the right to participate in debate and was appointed to committee positions but had no right to vote and hence no power to bargain for the enactment of legislation for the territory.

Military Needs and the Problem of Statehood. Until recent years we worried little about Alaska's military position. Russia had thought little enough of it to sell it to us. Canada had too much frozen waste of its own, and was not considered a predatory nation. We believed that our Navy could provide adequate defense against Japan. When during World War II Japan captured and held for a time islands in the Aleutian chain, our Navy was for a considerable period too busy in other parts of the world to do much about it. In his argument for Alaskan statehood so that Alaska's case could be presented by voting representatives in Congress, Governor Ernest Gruening, discussing naval defense, said that

> For years our voteless delegate in Congress rose on the floor and asked that something be done about Alaska's defense, which is the Nation's defense. He urged that $100,000,000 be appropriated to defend Alaska. The Navy said $10,000,000 was plenty, but we didn't get that. We got not one cent.
>
> Our delegate pointed out that the island of Kiska in the Aleutians had for some 30-odd years, since 1904, been surrounded on our maps by a green circle, marking it as a Naval station, and therefore destined for development as a base by the Navy, but the Navy which first occupied the island of Kiska was the navy of Japan. And Alaska was the only part of the American continent invaded and held by the enemy during World War II.[8]

Under the illusion that even in time of war the military would pay attention to the advice of senators and representatives in Congress about the erection of military installations, Governor Gruening told of his own efforts and those of other Alaskans to prevent gross military errors. An army base which might have been useful was constructed in the wrong place because General DeWitt in San Francisco refused to change an order he had already signed; $37,000,000 was spent on it, and then it was dismantled without having yielded any service. Said Governor Gruening, "I could give you repeated similar illustrations all over Alaska." [9] In the face of information that a tract chosen for an air base would be under water part

7. *Alaska Statehood*, Hearings, Senate Committee on Interior and Insular Affairs, 81st Cong., 2d. sess., p. 504.
8. *Ibid.*, p. 488.
9. *Ibid.*, p. 491.

The Post-War Pacific Area

of the time each year, the army went ahead with construction. When the water came the army built a dyke to protect it — and flooded a town by doing so! Although a senator reminded Governor Gruening that in time of war "everything is yielded to the military," and intimated that congressmen have little influence in such matters, Alaskans continued to believe that representation in Congress would help them get sensible and adequate defense.

With the defeat of Japan, the Soviet Union became the potential enemy. It began to build up strength just across the Bering Sea, and communists who can blithely claim that all important inventions of mankind were made in their own country have developed a line of argument that the United States has no right to Alaska. The Czar, they say, betrayed the Russian people in making the sale.[10] The defense of Alaska therefore takes on a grim timeliness, and if statehood will help promote defense, then there is a pressing argument for it. People still remember the words of Major General William Mitchell that "He who holds Alaska holds the world."[11]

The Battle for Statehood. From 1945 on, bills were constantly before congressional committees for admission of Alaska as a state. Defense provided an important argument, along with the contention that the granting of full territorial status had carried an implied promise of statehood when the territory was ready for it. It was said that our commitment to democracy obligated us to confer statehood, and that final integration of Alaska into the Union would defeat any criticism of lack of democracy in holding the area. There was opposition because of Alaska's detachment and distance from the other states, and because the population was limited so that a few people and perhaps a few vested interests would exercise control in an area of vast resources which belonged to the United States rather than to the few residents. There were strong objections to turning over the federal domain in Alaska to the new state, as was originally planned, and the proponents of statehood had to compromise on limited land grants for educational and other purposes. In Congress, furthermore, and particularly in the Senate, there was objection to granting the somewhat more than 100,000 people in Alaska representation in the Senate equal to that of the perhaps 15,000,000 in New York and only fewer millions in various other states. In spite of these drawbacks, however, the House of Representatives early in 1950 passed and sent to the Senate a bill to authorize Alaska to draft a constitution as a step toward the final achievement of statehood.

HAWAII

Territorial Government. For a number of reasons, perhaps, the Hawaiian Islands, once an independent kingdom, came voluntarily within the pro-

10. *Ibid.*, p. 493.
11. See for example Ernest Gruening, "Why Alaska Needs Statehood," *State Government,* vol. XXI (February, 1948), pp. 31–3.

tection of the United States. Defense undoubtedly was one motive. Important also was the desire to trade with the United States in sugar and other tropical products without the impediment of tariff barriers. The islands were annexed to the United States in 1898, by a joint resolution passed by the two houses of Congress when it proved impossible to get the necessary two-thirds majority of the Senate to approve a treaty. In 1900 Congress passed an organic act setting up a territorial government similar to those provided for continental territories and much like that later provided for Alaska. The governor is appointed by the President on the advice and consent of the Senate for a term of four years. A bicameral legislature is elected by the people. Provisions for the judiciary are more elaborate than those for Alaska. There is a system of territorial courts consisting of a supreme court, circuit courts, and such inferior courts as the territorial legislature may establish. Separate from the territorial courts proper is the district court, which corresponds roughly to the federal judiciary as it operates within the states. Judges of both the territorial courts and the district courts are appointed by the President with the advice and consent of the Senate. As in Alaska, the people of Hawaii elect a delegate to Congress who sits in the House of Representatives but does not vote.

The population of Hawaii consists of more than half a million people, approximately five times the population of Alaska. The region had a well established government at the time we acquired it. Its economy is more mature and stable than that of Alaska. The government, while similar to that of Alaska in pattern, is much more elaborate and more closely resembles that of a state. Hawaii has gone farther than Alaska in the direction of organization of local government although with features peculiar to itself. The area known as the City and County of Honolulu, for example, extends southward to encompass Palmyra Island some 900 miles distant and certain other islands in the north as well. The functions of cities and counties are inextricably mixed.[12]

Pursuit of Statehood. The people of Hawaii have long clamored for admission to statehood. It is argued, without specific documentation, that the territory was added to the Union with the implied promise that statehood would follow in due time, and it is contended that the provisions of the organic act which set up a territorial government comparable to the tutorial governments set up on the continent for future states implied eventual admission to statehood. The islands are prosperous; they have a stable population; and they have shown considerable capacity for self-government. In the light of the principle that there shall be no taxation without representation, it is interesting to note that in 1949 Hawaii contributed more internal revenue to the federal treasury than did eleven of the states.[13]

12. See Norman Meller, "A New Constitution for Hawaii," *State Government,* vol. XXI (June, 1948), pp. 129–32.

13. See *Congressional Record* (temporary daily edition), April 24, 1950, pp. A3089–90.

Although it is not pretended that Hawaiian statehood could have averted the debacle of Pearl Harbor which thrust us into World War II, it is believed that with voting representation in Congress Hawaii might have been able to escape rule by the military as soon as that rule was no longer necessary.

Congressional committees have enjoyed investigating conditions in Hawaii, and a number of them have looked into the problem of statehood and have leaned toward admission. One of the arguments frequently urged against admission is similar to one used against Alaska, namely, that Hawaii is detached and distant. To this it is replied that air transportation and radio bring it closer to the national capital than were many of the states of the Union at the time of their admission. There has been some discomfort in the thought that while absentee government may be bad for the islands, government of a new state by the "Big Five" corporations which control much of the business of the islands may also have little to recommend it. Another adverse argument is based on the mixed character of the Hawaiian population. As of 1945, the half million islanders included approximately 11,000 Hawaiians, 61,000 part Hawaiians, 9,000 Puerto Ricans, 172,000 Caucasians, 30,000 Chinese, 163,000 Japanese, 7,000 Koreans, 46,000 Filipinos, and a mixture of other races. It is feared by some people that the different racial groups would indulge in what is called bloc voting and that non-white elements might succeed in controlling the government.[14] It is pointed out, however, that the mixture of racial groups in Hawaii has not resulted in the conflict among certain groups which seem to take place wherever substantial numbers of different racial groups have contact in the United States. As of 1950 the speaker of the territorial House of Representatives was of Chinese ancestry and the president of the Senate of Japanese ancestry. They were chosen primarily by people of other races than their own.[15] The Hawaiian situation provides one American example of different racial groups living together amicably without important racial friction. There is no reason, therefore, to believe that upon admission of Hawaii to the Union the several racial groups will combine one against another for the exercise of political control.

Early in 1947, the House of Representatives passed a bill authorizing the admission of Hawaii to the Union. The Senate, however, delayed action, partly because of disturbance over reports of the growth of communism in the islands. The basis of much of the concern was the power in shipping exercised by the Longshoremen's Union, of which the leadership was allegedly communist. It was feared that Hawaii as a state might not be able to cope with the communists, that the state government might fall into their hands, and that communists from Hawaii might win seats in Congress. Although communist-inspired strikes made further trouble in the islands and brought about further congressional investigation, the

14. See House Report No. 1620, 79th Cong., 2d. sess., as reprinted in *Statehood for Hawaii*, Hearings, House Committee on Public Lands, 80th Cong., 1st sess., pp. 27–35.
15. *Hawaii Statehood,* Hearings, Committee on Interior and Insular Affairs, 81st Cong., 2d. sess., p. 56.

House of Representatives early in 1950 passed another statehood bill. While continuing to urge its enactment, Hawaii in the meantime approached the problem from another direction, calling a constitutional convention to be voted on by the people and submitted to Congress with a petition for admission as a state. This device of coming to Congress with a constitution already adopted was, as noted above, used by many of the territories earlier admitted.

PUERTO RICO

Status as a Territory. As a territory Puerto Rico has never had quite the same status as that given to Hawaii in 1900 and to Alaska in 1912. It has never been "incorporated" into the United States by a statute specifying that the Constitution and laws of the United States extend to it. To Puerto Rico and to other "unincorporated" territories are extended only those constitutional rights which are deemed "fundamental," and which are unfortunately not defined, together with such other rights as Congress specifically confers by statute. The degree to which constitutional rights are extended by congressional action varies from territory to territory depending upon size, population, governmental traditions, economic situation, the peculiar interest of the United States in the territory, and other circumstances.

Puerto Rico is an island lying southeast of the United States on the northeastern rim of the Caribbean Sea. With mixed motives but probably with more interest in terminating Spanish rule than in exercising American authority, the United States acquired the island at the close of the Spanish-American War along with the Pacific islands of Guam and the Philippines for the sum of $20 million. Puerto Rico has a rapidly growing population of more than 2 million people, of whom approximately one-fifth are colored. The traditions and the language used are predominantly Spanish, although American influence is spreading rapidly. The dominant industry has been the production of sugar, which for a long while was largely under the control of large scale landowners, including a growing number of capitalists from the United States. To a considerable extent, therefore, the masses of the people have been dependent upon a one crop or a dominant crop system and upon the owners and managers of that system. Economic gradations have run all the way from substantial wealth to poverty and the margin of subsistence. Although it has thus far proved impossible to provide employment for the entire population, any improvement in the economic situation seems merely to stimulate population growth. It is in general not a prosperous area, even though its people, unlike the residents of the "incorporated" territories of Alaska and Hawaii, do not pay federal income taxes.

The Government of Puerto Rico. In its treatment of island possessions held by Spain at the time of the Spanish-American War the United States

has dealt differently with each individual situation. After a period of military occupation it recognized the independence of Cuba except for what was known as the Platt Amendment to the Treaty of Independence which, until modified in 1934, reserved to the United States some right to give protection against foreign intervention and against internal disturbances. The Philippines were governed as a territory, with ultimate provision for qualified independence in 1946. Puerto Rico, on the other hand, has been governed as a territory without any commitment as to whether territorial government would continue indefinitely, would lead to independence, or would lead to statehood. With political discontent accentuated by varying degrees of economic distress, various groups of Puerto Ricans have demanded independence or statehood. In general structure the territorial government closely resembles that of Hawaii. It has the usual legislative, executive, and judicial branches. Until 1948, the governor was chosen for four years by presidential appointment with Senate confirmation. The bicameral legislature is locally elected. The judiciary consists of a system of territorial courts and a district court which corresponds to the federal courts which operate in the states. Administrative offices and agencies reflect a pattern similar to that of the organized territories and of the several states. A Resident Commissioner corresponds roughly to the delegates sent to Congress by Alaska and Hawaii.

Reform Measures. For various reasons the American people have not been quite willing either to give close attention to Puerto Rico or to let it go. Business interests have considered it predominantly an area for exploitation. It was not until the appointment of Rexford G. Tugwell as governor in 1941 that any American in the position of authority actively promoted the welfare of the Puerto Rican people. An ardent enthusiast for social and economic reform, Tugwell carried the spirit of the New Deal to the island — and its spending policies as well — and he succeeded in various ways in bettering the position of the rank and file of the people. Among other things, through a so-called "five hundred acre law," some of the huge sugar estates have been divided up in such a way as to diversify ownership and control of agricultural land.[16] The Puerto Rican New Deal stirred the wrath of wealthy owners and precipitated a congressional investigation of the Tugwell administration. The investigation demonstrated the need for reform and solidified the program. For military and other purposes the federal government has made extensive investments in the island, and in doing so has contributed to local prosperity.

The Puerto Ricans have been more restive under the absentee control of governors appointed from Washington and of American businessmen than have the Hawaiians, perhaps in part because people from the mainland make up a smaller proportion of the population. The rivalry between

16. See Emmet Crozier, "Puerto Rico's Prime Asset — People," *New York Herald Tribune*, June 17, 1948. See also *Puerto Rico* v. *Eastern Sugar Associates*, 156 F (2d) 316 (1946).

the governor appointed by the President and the locally elected legislature seems to have developed some of the characteristics of the struggle between American colonial legislatures and the colonial governors sent out by the king of England. A Puerto Rican commission on the reorganization of the executive branch says in summary that

> The Governor, appointed from distant Washington, exercised executive direction; while the president of the Puerto Rican Senate ordinarily exercised political leadership. Neither official had the authority necessary to take action in the formulation and execution of public programs.
>
> This split between elected and appointed leadership produced further obstacles to effective action within the executive branch. The legislative assembly tended to mistrust broad authority in the hands of an appointed governor, and it consequently created within the executive branch a series of checks on his authority to act, particularly by placing many statutory powers in the executive council. These checks served only to divide further the central leadership of the government.[17]

In 1947 Congress yielded to the demand for more territorial autonomy by authorizing Puerto Rico to elect its own governor, for four-year terms. The first elected governor took office in January, 1949. In this respect Puerto Rico attained an objective never attained by any other United States territory. This step did not, it is true, imply the management of all island affairs by the territorial government. Congress continued to legislate for the island in major matters. An Office of Coordinator of Federal Agencies in Puerto Rico centralized a great many federal offices there which correspond somewhat to the federal offices which are to be found in any major American city or state capital.

As noted by the governor of Puerto Rico in a statement to a congressional committee, Puerto Rico now occupies a unique position:

> In passing the law allowing the people of Puerto Rico to elect their own governor for the first time, it is my view that Congress is practically giving shape to a new kind of state. You find no dependency anywhere in the world that elects its own executive and legislative government. The step taken in Puerto Rico is tradition-shattering. . . . It does create a new kind of state. It is not an old kind of state, of course, but neither is it a dependency, because it governs itself locally. It is not an old kind of state because it has no voting representation in Congress because it pays no federal taxes.[18]

Because full statehood would imply the necessity of paying federal income taxes, and might cut off the flow of business to Puerto Rico based on tax exemptions, the present Puerto Rican officials do not seek statehood. They prefer their unique position but seek further independence in the form of the right to draft their own constitution instead of relying merely on an organic act passed by Congress as their fundamental law.[19] In 1950 Con-

17. Commission for Reorganization, *Report on the Reorganization of the Executive Branch of the Government of Puerto Rico* (San Juan, Puerto Rico, 1949), p. 1.

18. *Report of the Governor of Puerto Rico,* Hearings, House Committee on Public Lands, 81st Cong., 1st sess., p. 4.

19. See *Statement by the Governor of Puerto Rico,* Hearings, House Committee on Public Lands, 81st Cong., 2d. sess.

gress passed an act authorizing Puerto Rico to draft a constitution for a republican form of government with a bill of rights and submit it to the President who, if he found it in conformity with the federal Constitution, would submit it to Congress for approval.

Since Puerto Rico has been integrated into the defense system of the United States, it seems improbable that we shall change our policy to the extent of granting independence and giving up all military bases and installations. For some time to come the excess population of Puerto Rico is likely to be an unsolved problem for us. Since American citizenship has been conferred on the Puerto Ricans, with the accompanying right of immigration, the excess population is a problem for the continent as well as for the island itself. Like alien peoples of other races, Puerto Ricans come to American cities and occupy and develop great blocs of slums. It was estimated in 1947 that New York City already had a population of 350,000 to 400,000 Puerto Ricans, with annual additions of some 30,000 more. In language and culture they are more Spanish than American, their economic status is shockingly low, and the problem of absorbing and educating them seems impossibly difficult. It may well have been a mistake to confer American citizenship on them until a solution of the problem was in sight.

THE PHILIPPINES

Along with Puerto Rico the United States acquired such rights as Spain had in the Philippine Islands in the far Pacific. It conquered resisting forces among the natives and governed the islands for more than a third of a century, seeking to improve their economic condition and to teach them modern forms of self-government. Throughout the period of American control, Congress debated whether the Philippines should be held indefinitely or whether the people should merely be educated to maintain their own independence. The value of the islands to the United States was a matter of dispute. Because of their distance from the United States, it was seriously doubted whether they could be held in time of war. Finally, in 1934, Congress authorized the formation of a commonwealth government which would achieve approximately full power at the end of a ten year period, when the United States would give the Philippines their independence except to reserve military and naval bases.

During the ten year period of tutelage the islands were overrun by the Japanese, American military forces there were defeated and captured, vast quantities of property were destroyed, and the economy and the political system were thoroughly disrupted. The status of independence which was achieved in 1946 came, therefore, under most unfortunate circumstances. Since that time the new government has been engaged in the slow process of reestablishing an effective political and economic system under difficulties which are enhanced by the termination of American responsibility. The United States has made substantial appropriations for rehabilitation. Although such expenditures are more than welcome, the retention of Ameri-

can bases in the islands in time of peace promises to be a source of irritation. However that may be, American policy in the matter is likely to be made in the light of the spread of communism in the Orient. To retain bases against the will of the Philippine government is in a sense to limit the independence of that government, but doing so also implies recognition of the fact that, in the future as in the past, the islands could not be expected to take care of themselves in the event of a war between major powers. Since that is true, the United States wishes to protect as fully as possible its own strategic position.

MISCELLANEOUS DEPENDENCIES

The Virgin Islands. Scattered from the eastern Caribbean to the western Pacific, the United States has a number of miscellaneous dependencies which vary greatly in size, population, and resources, and which are held by the United States for varying reasons. The Virgin Islands, which lie east of Puerto Rico, were purchased from Denmark in 1917. The governor of the islands is appointed by the President with the consent of the Senate. He reports to the Secretary of the Interior, who takes more responsibility for them than for the larger territories, which are also in some degree supervised through the department's Division of Territories and Island Possessions. The island legislature consists of joint sessions of the councils of three municipalities. It can consider no legislation other than that specified in a message by the governor or in resolutions passed by each of the three municipal councils. Congress has prescribed a bill of rights. The governor, at present a native Negro, who holds office at the pleasure of the President, has considerable power. While the islands are no great asset to the United States, they lie within our defense area, and it might prove embarrassing to have them in the possession of an unfriendly power.

The Canal Zone. In 1902 the United States leased from Panama a strip ten miles wide across the Isthmus of Panama for construction of the Panama Canal. The several thousand people living in the zone are there primarily for the operation and defense of the canal. It is difficult, therefore, to treat the zone as an all-purpose residential area in which the machinery of democracy ought to be used. Congress legislates for the zone without the aid of any local legislative body. The governor, who is appointed by the President to act under the supervision of the Secretary of the Army, operates local government almost as a part of the operation of the canal itself.

Guam. Guam is a large and fertile island with fine harbor accommodations lying between the Philippines and Hawaii. It has a population of approximately 96,000, of whom about 26,000 are of native stock. The United States acquired it from Spain along with Puerto Rico and the Philippines. It was governed by the navy until 1950, when the President

transferred jurisdiction over it to the Department of the Interior in preparation for the establishment of democratic government. The Guamanians had been classified as nationals but not as citizens of the United States. In 1950 Congress enacted a measure

> to confer United States citizenship on the people of Guam, to grant them a bill of rights, to establish a representative form of government in accordance with our democratic tradition, to provide effective protection of the rights of individuals under law through an independent judiciary, to define the scope of executive authority of government, to accord the greatest practicable measure of local self-government, and to fulfill the international obligations of the United States government with respect to Guam.[20]

The government of Guam is therefore in a state of transition from that of a naval station to that of a territory somewhat similar to those already discussed. We keep it, of course, primarily because of its value as a naval base. Prior to World War II Congress refrained from fortifying it and developing its harbors because of the fear of giving offense to Japan. After Japan had taken it away from us and we had taken it back, the process of fortification and development got under way. The operation of a territorial government must take place in subordination to our major purpose in exercising jurisdiction over the island.

American Samoa. During approximately the same period another island possession in the Pacific, known as American Samoa, has like Guam been governed by the Navy. Plans are under way for its transfer likewise to the Department of the Interior and for the establishment of a territorial government with democratic forms and for the granting of American citizenship. Receiving as yet lesser attention are the islands of Wake, Midway, Jarvis, Baker, Howland, and others, with names largely unfamiliar to the American people except as the battles of World War II brought them to attention. With changes in the character of modern warfare, however, and with our Navy and our aircraft operating all over the Pacific Ocean, these islands take on increased importance, they are colonized for American purposes, and it is necessary to establish governments as democratic in form as the circumstances will permit.

THE UNITED NATIONS AND THE GOVERNMENT OF TERRITORIES

Non-Self-Governing Territories. By implication the Charter of the United Nations condemned the practices of colonial exploitation in which the nations of the world had long engaged. It classified territories or colonies in two major groups, non-self governing territories and trust territories. Non-self-governing territories were in large part the territories or colonies over which members of the United Nations already claimed sovereignty but for which they accepted certain obligations through the

20. *Providing a Civil Government for Guam, and For Other Purposes,* House Report No. 1677, 81st Cong., 2d. sess., p. 1.

charter. They agreed to "recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present charter, the well-being of the inhabitants of these territories." To that end they undertook the following commitments:

> *a.* to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
> *b.* to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
> *c.* to further international peace and security;
> *d.* to promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this article; and
> *e.* to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.[21]

In partial fulfillment of these commitments the United States makes reports to the United Nations on its administration of the territories which it owns and which have been discussed here.[22] The United Nations has not attempted in any way to compel changes in our administration of our territories. Yet it may well be that American administrators of territories will show greater sensitivity toward criticisms by the residents of territories now that those residents have the right of appeal to an outside forum. It may be that the residents of Guam, American Samoa, and other islands will get more adequate definition and protection of their rights now that those rights have been recognized as a matter of concern of the United Nations.

Trust Territory. During World War II the United States not only took back in hard fought battles the Philippines, Guam, and other of its possessions which Japan had seized, but also captured other Pacific islands, including many which Japan had held under mandate from the League of Nations and had fortified in violation of the mandate agreement. In the light of this experience with Japan, it seems clear that the United States would have planned to keep permanent possession of some or all of these islands had there been no international organization to supervise the distribution and management of dependent areas. The Charter of the United Nations, however, provided for an international trusteeship system to apply

21. Charter of the United Nations, Chapter XI, Article 73.
22. *The United States and Non-Self-Governing Territories,* United States — United Nations Information Series 18, Department of State Publication 2812 (1947).

to territories previously held under the League of Nations mandate, to others which might be detached from enemy states as a result of World War II, and to still others which might voluntarily be placed under the system. The territories in question were to be allocated to supervising nations but were to be administered under the inspection of a trusteeship council of the United Nations. The trustees were to make periodic reports on their administration, and the trusteeship council, acting under the authority of the General Assembly, was authorized to consider reports, to accept and examine petitions, to provide for periodic visits to the respective trust territories. The United States agreed to transfer the captured islands to the United Nations with itself as trustee.

The United States Trust Territory includes the Marshall Islands, Caroline, and Marianas Islands. One of the latter group, Guam, it already owns outright. The Trust Territory is scattered over some three million square miles of the Pacific, with a combined land area of about 687 square miles. For administrative purposes it is divided into five administrative districts. Jurisdiction was lodged temporarily in the Department of the Navy, with the expectation of transfer to the Department of the Interior by about 1951. Native cultures differ greatly from island to island and have been modified in varying degrees by periods of Spanish, German, and Japanese control. A navy report says that

> There are two institutions, however, widespread throughout the territory, which influence the development of self-government; first, the strong tradition of hereditary chiefs or nobles; second, the council, instituted within the native cultures and consisting usually of family heads or elders. These councils function as sounding-boards of public opinion, to temper the normal powers of the chiefs to a greater or lesser degree.[23]

For local government the United States makes the fullest possible use of local personnel and machinery. It is doing a great deal to promote the health and education of the native peoples, and an organic act to be passed by Congress may be expected to define the rights of those peoples. Neither our acceptance of the trust, however, nor our plan to transfer administration from the navy to the Department of the Interior and enact governing legislation must be taken as evidence that we are concerned alone with the welfare of the inhabitants of the islands. Our original added concern was with administering the islands in such a way as to promote world peace. That concern has not changed fundamentally, but it has become more specific through the expectation that if a major war broke out the instigator would be the Soviet Union. One of the islands, Eniwetok, has been set aside as an experimental ground for techniques of atomic warfare. Others may well be in use for similar purposes. When using their islands in this fashion we transfer the natives to other islands and attempt to reestablish them. We do not, however, admit their right to stand in our way.

Within the area of territorial government, therefore, we operate with a

23. Navy Department, *Trust Territory of the Pacific Islands* (OP NAV — P22 — 100H, 1949), p. 12.

wide range of purposes, from preparing a territory to enter the Union as a state to depopulating an island in order to use it as a place for testing explosives. Upon territories being prepared for statehood we confer all the rights which the Constitution confers on the American people. To other territories we give through organic acts many but not all of the rights specified in the Constitution. Upon the inhabitants of the lesser islands under our jurisdiction we have in the past conferred only such rights as naval administration saw fit to give. As a result of implied pressure from the United Nations, of which we are the most powerful member, and of a growing disapproval throughout the non-communist world of colonial exploitation as long practiced by various colonial powers, the obligation to recognize the rights of native populations has been more and more fully accepted. To keep perspective in the matter, however, it must be remembered that while non-communist nations are moving in the direction indicated, the ruthless exploitation of satellite nations by the Soviet Union represents a march in the opposite direction. The behavior of an aggressive communism, however much we may seek to avoid it, will inevitably have some effect in shaping our own conduct.

References

Joseph Barber, Jr., *Hawaii: Restless Rampart* (Bobbs-Merrill, 1941).

Charles A. Beard, *The Idea of National Interest* (Macmillan, 1934).

Ernest L. Bogart and Donald L. Kemmerer, *Economic History of the American People* (Longmans, Green, 1942).

Isaiah Bowman, *The New World: Problems in Political Geography* (World Book Co., 4th ed., 1928).

James Byrce, *The American Commonwealth* (Macmillan, 2d. ed., 2 vols., 1891).

Thomas B. Clark, *Hawaii — The Forty-Ninth State* (Doubleday, 1947).

Victor S. Clark, et al., *Porto Rico and its Problems* (Brookings, 1934).

L. H. Evans, *The Virgin Islands; From Naval Base to New Deal* (Edwards, Ann Arbor, Mich., 1945).

William H. George and Paul S. Bachman, *The Government of Hawaii, Federal, Territorial and County* (University of Hawaii, 3d. ed., 1932).

Arthur D. Guy, Paul T. Horman and E. K. James, *Sugar Economy of Puerto Rico* (Columbia University Press, 1938).

William H. Haas (ed.), *The American Empire; a Study of the Outlying Territories of the United States* (University of Chicago Press, 1940).

J. Ralston Hayden, *The Philippines: A Study in National Development* (Macmillan, 1942).

Herbert H. Hilscher, *Alaska Now* (Little, Brown, 1948).

Independence for Puerto Rico, Hearings before the Committee on Insular Affairs and Territories, 79th Cong., 1st sess. 1945–1946).

Johannes Mattern, *Geopolitik: Doctrine of National Self-Sufficiency and Empire* (The Johns Hopkins Press, 1942).

Norman J. Padelford, *The Panama Canal in Peace and War* (Macmillan, 1942).

Catherine L. Porter, *Crisis in the Philippines* (Knopf, 1942).

Julius W. Pratt, *Expansionists of 1812* (Macmillan, 1925).

George W. Spicer, *The Constitutional Status and Government of Alaska* (Johns Hopkins Press, 1927).

Nicholas J. Spykman, *America's Strategy in World Politics* (Harcourt, Brace, 1942).
Laura Thompson, *Guam and its People* (Institute of Pacific Relations, 1947).
Rexford G. Tugwell, *The Stricken Land: The Story of Puerto Rico* (Doubleday, 1947).
United States Department of State, *The United States and Non-Self-Governing Territories* (Government Printing Office, 1947).
J. C. Vincent, *America's Future in the Pacific* (Rutgers University Press, 1947).
Albert K. Weinberg, *Manifest Destiny: A Study of Nationalist Expansionism in American History* (The Johns Hopkins Press, 1935).
Trumbull White, *Puerto Rico and its People* (Stokes, 1938).

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Federalism and Regional Control

Important as is the government of outlying territories and the exercise of power in varying degrees throughout the world, the prime responsibility of the government of the United States is exercised within the states of the Union. In our preoccupation with the current expansion of the power of the federal government, it is sometimes hard to remember that for internal government the states came into existence before there was a Union, and that it took a great deal of persuasion to bring about the adoption of a Constitution which to a considerable extent impaired the sovereignty of the states. The framers of the Constitution were not interested in creating a government to take over the mass of local functions then being performed by the states. They wanted a central government primarily for central purposes only, which included the conduct of foreign affairs, defense against foreign enemies, and the prevention of shortsighted activities on the part of individual states which might interfere with maintaining a united front toward foreign powers or with the conduct of sound business throughout the country. Under the Constitution the states retained all their original powers except those conferred on the federal government or forbidden by the Constitution. The federal government was to exercise only those powers conferred upon it, but was authorized to exercise them to the full, even though in doing so it might curb the exercise of traditional state powers.

The framers of the Constitution were concerned about the merits of federalism — the division of power between governments at different levels — and we are concerned about them today, but the emphasis has greatly changed. In the 1780's emphasis was on preserving the states as primary instruments of government; few people accepted the radical doctrine of Alexander Hamilton that state lines should be replaced by regional boundaries of subdivisions of a central government. Today, by contrast, it is the independence of the states that has to be justified rather than broad power in the hands of the federal government. It is of course recognized that not all governing could be done from Washington and that a great deal of regional and local government would have to be carried on. The question is not one of administrative decentralization, in which the federal

government already engages in innumerable fields, but of maintaining states which are still sovereign within their spheres and which can not be compelled to coordinate their policies with those of the government in Washington. It is argued that in this age of the "positive state" it is undesirable to have within our governmental structure uncoercible state units which may defeat national programs by their refusal to cooperate. It is argued that state governments are less efficient and more corrupt than the federal government, and that inefficiency and corruption are not to be tolerated at a time when improvement or decline in the public welfare turns on the exercise of nicely balanced judgments.

The fact remains, however, that we still have the states and are likely to have them for a long time to come. There are reservoirs of local patriotism which would foster rebellion at the abandonment of state government. Local political interests have too much at stake in preserving state and local government in its present form to permit its elimination. Some state areas differ so sharply from the business and welfare policies of the federal government that the states are needed as a kind of local refuge from the drive of power from Washington. Beyond all this and in spite of our fascination with bigness in most walks of life, there is a reservoir of belief that too much power concentrated in one place is dangerous, and that only through the preservation of lesser than national governments for less than national purposes can the rights of the people be protected and the varied desires of the people be realized.

So it is that the federal government and the states continue to operate throughout the same area, each exercising powers within its sphere. There is perennial overlapping and a measure of conflict which has to be resolved by agreement or by the decisions of courts, usually federal courts, which have the final say about jurisdiction in such matters. Federal statutes and federal activities are not held unconstitutional because they encroach upon the jurisdictions of the states. If the courts find them unconstitutional it is because the federal government has exceeded the powers granted it. Within the range of those powers, its jurisdiction is supreme, whatever the interference with the scope of state activities. In broadly expanding the exercise of its powers to regulate commerce, to tax, to spend, to make treaties, and to wage war, the federal government has made itself an ever-present and highly active participant in the daily activities of the people in all parts of the Union. Because its own expanded functions in the regulation of business and the promotion of welfare overlap with those of the states, it has attempted — by grants-in-aid and other devices which will be discussed in part in the following chapter — to bring state policies into harmony with its own. To the extent of its success, and however reluctantly the states may act, they become satellites of the federal government instead of independent sovereignties. To become such satellites, however, is part of their sovereign privilege, and it may be better to have them do so in specific instances than to frustrate federal programs on the one hand or on the other hand to shift additional powers to administrative agencies of the federal government.

REGIONAL GOVERNMENT

Major problems of federalism — with which most of this chapter is concerned — develop in regions of the country which overlap a number of states and fail to conform to state boundaries.[1] For important purposes they need to be treated as units. They are not national in scope but neither can they be governed as units by individual states. One of these regions is the Tennessee Valley. Among the others are the valleys of the Missouri, the Columbia, the St. Lawrence, and the Connecticut. These regions have a great deal in common and also some important differences. Among the common factors are water power potentialities, either in the main streams, their tributaries, or both. By the erection of dams and the installation of generators and other equipment, water power can be converted into electric power which can provide the driving force of industry and, if distributed at sufficiently low cost, can relieve economic pressure upon city dwellers and revolutionize the pattern of rural living.

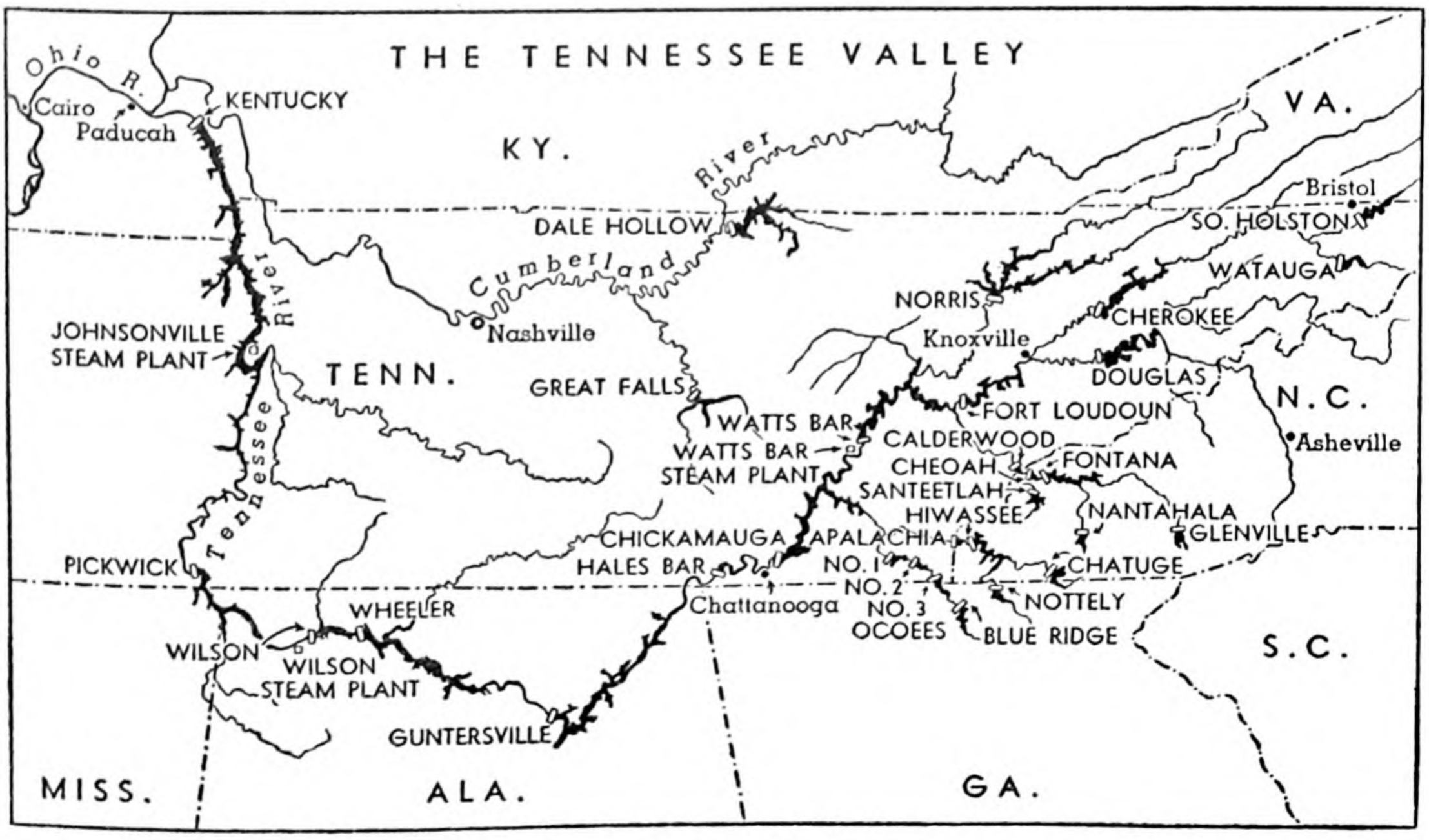
If dams are constructed for electric power, however, they should be constructed not only with an eye to the location of industries and service to communities but with transportation and other factors in mind. In general, water transportation is cheap transportation. Streams which are not navigable for any considerable distance because of shoals and rapids over which ships are unable to pass can often be made navigable by dams and locks. Streams which lose their navigability in dry seasons can sometimes be kept navigable by storing water behind dams and releasing it gradually in periods of little rainfall. In other words, planning for the utilization of streams throughout their entire lengths without reference to state lines can sometimes develop navigable highways not previously available at all or available only at certain seasons of the year. Control of the water supply, furthermore, may eliminate millions of dollars in annual damage from floods and in dry areas make possible the irrigation and cultivation of fertile land which would otherwise have little value.

Well planned treatment of an entire valley area can stimulate production, increase income, and revitalize community living. It can stimulate deeper interest and greater expenditures on education, public health, artistic improvement, and things cultural generally. Such operations, however, while beginning with the control of navigable streams over which the federal government has unquestioned jurisdiction, reach far down into the intimate problems of community living which are assumed to belong to the jurisdiction of the state governments or of the units of local government which are in large part arms of the state. The unified handling of regional problems must therefore involve either the replacement of state and local governments by the federal government or active collaboration between the federal and state governments toward the same end. The

1. For background on regional problems in the field of national resources see National Resources Planning Board, *Development of Resources and Stabilization of Employment in the United States,* House Doc. No. 142, 77th Cong., 1st sess.

wholesale improvement of such an area with extensive collaboration between the federal and state governments is well illustrated by the operations of the Tennessee Valley Authority.

The Tennessee Valley. The Tennessee River flows through, borders upon, or receives tributaries from seven states, including Virginia, Kentucky, North Carolina, Tennessee, Georgia, Alabama, and Mississippi. The welfare of these several states is involved in varying degrees in the utilization of the streams. With adequate control and with the elimination of barriers to navigation, the river has enough water to provide a navigation channel at least nine feet deep from Knoxville, Tennessee, to the point in Kentucky some 650 miles downstream where it flows into the Mississippi. The decline in elevation over that distance is such as to offer almost unmeasured wealth in water power if harnessed for productive purposes. If properly watered, properly cultivated, and properly protected against damage by floods, insect pests and other evils, the area is capable of extensive farm and forest production. In spite of the potentialities of the Tennessee River valley, however, little attempt was made before World War I to develop the river resources. Shoals and rapids interfered with navigability. Little had been done to utilize water power. Floods did their work of destruction year after year. The industries of the area were small and scattered. The conditions of rural living were impoverished. Forest areas were inadequately protected and erosion was eating away the soil. No unified attempts were made at solution of the problems of the valley as a whole. Attempts to solve community problems were delimited by the boundaries of the several states, however artificial those boundaries might be in terms of the scope of the problem.



The first break in the traditional pattern came with the enactment of the National Defense Act of 1916, by which Congress authorized the President to select a site with abundant cheap water power for the purpose of extracting nitrogen from the atmosphere. The nitrogen was to be used for the manufacture of explosives. For that purpose the government constructed Wilson Dam and other equipment at Muscle Shoals in Alabama.

World War I had come to an end before the Muscle Shoals development could play any important part. For nearly fifteen years the country was torn by controversy over disposal of the dam and plant equipment. Private power interests sought control over it at the lowest possible figure. Meanwhile the public had learned something of the potentialities of Muscle Shoals for the manufacture of fertilizer, of the value of dams in the stream to promote navigation, and of its potentialities for the production of electric power. Liberal groups throughout the country were denouncing excessive rates and lack of civic-mindedness on the part of private electrical companies and urging government production and sale of electricity in selected areas to provide a "yardstick" to measure the cost of production and to discover a fair level for private rates. These critics of private industry demanded that the government retain and operate Muscle Shoals to provide such a yardstick.

TVA The controversy was resolved in May, 1933, with action by the first session of Congress under the New Deal in a measure entitled

> An act to improve the navigability and to provide for the flood control of the Tennessee River; to provide for reforestation and the proper use of marginal lands in the Tennessee Valley; to provide for the agricultural and industrial development of said valley; to provide for the national defense by the creation of a corporation for the operation of government properties at and near Muscle Shoals in the state of Alabama, and for other purposes.[2]

In other words, finding its authority in the navigability of the Tennessee River and in its responsibility for providing for national defense, Congress initiated a program of development for the entire Tennessee Valley without reference to state lines. A government corporation with a board of three men called the Tennessee Valley Authority and commonly referred to as TVA was given broad jurisdiction to construct dams, power plants, and other facilities; to clear streams for navigation; to produce, distribute, and sell electric power; to provide for reforestation of denuded areas which were not good farm lands; to produce and experiment with the application of fertilizer; and to perform such other activities as were necessary in relation to those specifically mentioned.

TVA has had an enormous impact upon living conditions and community activities throughout the Tennessee Valley. It has made the Tennessee River a highway of commerce. By the erection of numerous dams, it has turned the original river bed and adjacent areas into a series of navigable lakes which are used not only for navigation but also for recre-

2. 48 Stat. 58.

ation, aquatic food supply, and creation at the dam of enormous quantities of electric power. The availability of large quantities of electric power at low rates has attracted diverse industries to the valley. New industries have given variety to methods of earning livelihood, increased the income of the area, and stimulated the expansion of education and public health and recreation services throughout the various communities. Reforestation, the use of new methods for preventing erosion and soil depletion generally, and the application of cheaply produced fertilizers have greatly modified and improved the basis of agricultural production. The distribution of electric power throughout farm areas which is available at low cost, and the marketing of electrically driven farm machinery of various kinds, have greatly changed the character of rural life.

In providing for the distribution of electricity, Congress directed the board of the Tennessee Valley Authority to "give preference to states, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members." [3] Prior to the TVA development, the valley's cities and towns had been served by privately owned electric companies at relatively high rates. In order to secure lower cost electricity, large numbers of communities built new distributing systems or purchased privately owned systems already in existence and entered into contracts with TVA at favorable rates. Considerable numbers of cooperative organizations were created in rural areas for the same purpose. The privately owned utilities fought bitterly but unsuccessfully against the process whereby they were gradually pretty much squeezed out of the field. Their principal achievement on behalf of their stockholders was in selling their equipment at high prices to TVA or to local governmental or cooperative agencies.

State-Federal Cooperation. So it is that over a period of fifteen or twenty years, life in the Tennessee Valley has been enormously modified by the establishment and operation there of a federal agency which now lists its fixed assets at over $850 million.[4] Beginning with matters over which the jurisdiction of the federal government is obvious, its influence extends to practically every phase of community life. Hostile critics have denounced TVA as a super-state. It was said that TVA had usurped both the rightful position of the several states and the positions of the several federal agencies which had jurisdiction over federal matters. To demonstrate its character as a cooperative rather than a totalitarian organization, TVA has summarized some of its cooperative activities as follows:

> The latitude for cooperation with other agencies, federal, state, and local, and the encouragement of such cooperation in the TVA Act, has been extensively used and to advantage. TVA has enlisted the cooperation of many agencies to achieve a more unified development of the valley with

3. 49 Stat. 1076.
4. *Annual Report of the Tennessee Valley Authority,* 1949, p. A6.

the result that the programs of these agencies have been strengthened. Some extension services, county agents, farm associations, and individual farmers; States Geological Survey and the United States Coast and Geodetic Survey; in malaria control, with the United States Public Health Service, and the state health departments; in agricultural development based on mineral plant nutrients, with the United States Department of Agriculture, the state extension services, county agents, farm associations, and individual farmers; in fish and wildlife conservation, with the United States Fish and Wildlife Service and the State conservation departments; in providing school and library services at TVA construction projects, with county and municipal agencies.[5]

From the beginning, TVA worked closely with large numbers of state and local agencies. These include the land grant colleges and their extension services, departments of conservation, departments of health, and agencies concerned with education, highway construction, and various other functions. As in the instance of library services, established by TVA and then turned over to state and local governments for operation, TVA has attempted to decentralize to the full extent to which state and local governments could be persuaded to assume and carry on functions which could be delegated. In a sense it might be argued that the cooperation of state and local governments was purchased by the lavish expenditure of federal funds. If such a purchase was made, however, it was in no sense venal in character. It grew out of demonstration by TVA of what could be done to promote local welfare by participating in the program. The state governments did not have to authorize their municipalities to establish electric distributing systems or to provide wharf facilities to promote the development of river navigation. Even having the consent of the states, the municipalities were not compelled to cooperate. They did cooperate, however, because they found it to their economic advantage to do so. By collaborating they raised the living standards and added to the richness of life of people in the respective communities. The story of increased income is well summarized in the following paragraphs from the 1947 and 1948 Annual Reports. From the 1947 Report:

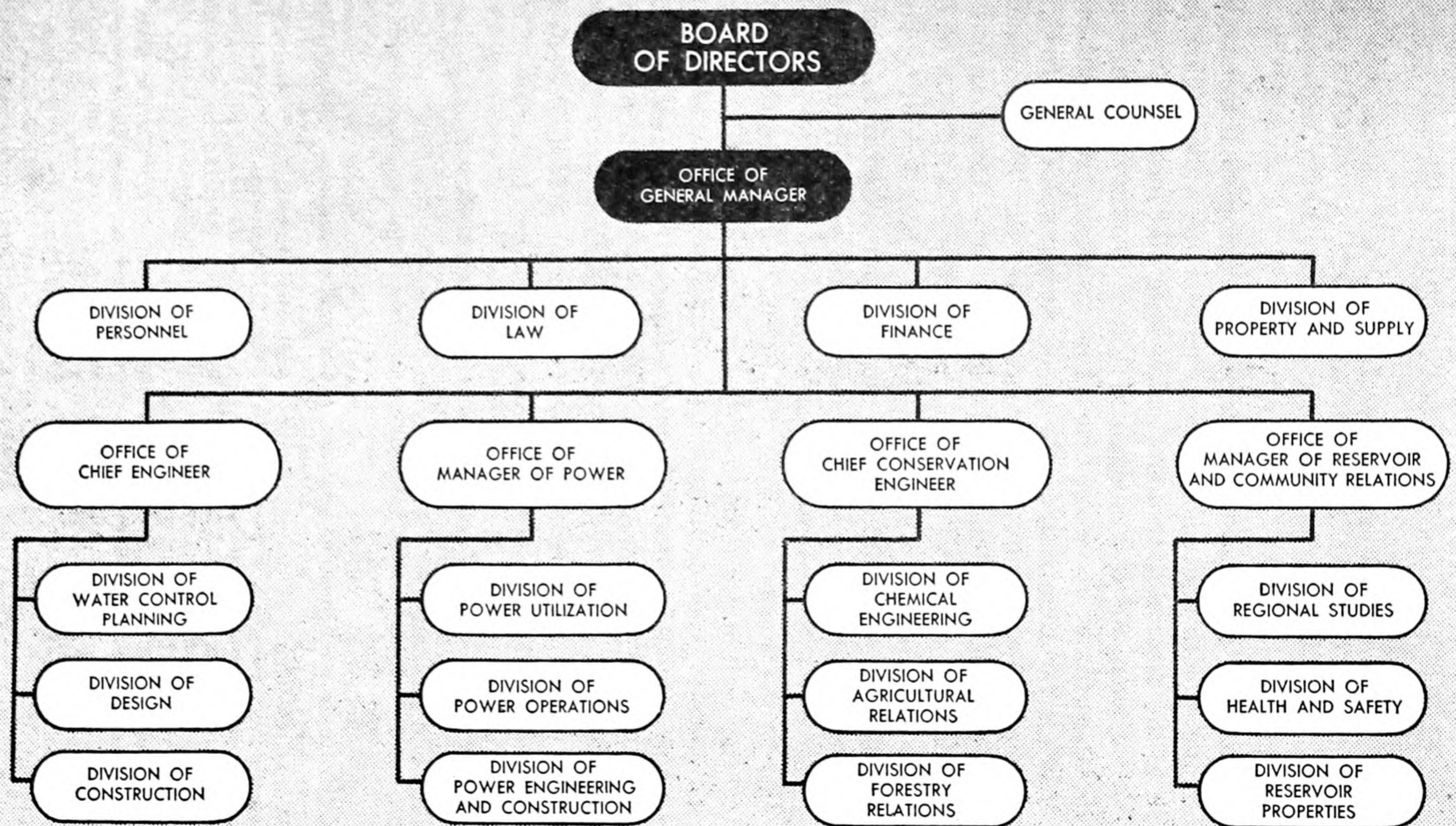
> There is growing evidence of the economic advances the region is making. In 1933, the average per capita income in the Valley was only 40 percent of the national average. In 1945 the per capita income of the Valley had risen to 58 percent of the national average. In the 12-year period, the people of the Valley had thus increased their economic status with respect to the nation by 18 percentage points or by nearly 50 percent. In terms of dollars, that means that the 2.1 billion dollars income of the people of the Valley in 1945 was 680 million dollars more than it would have been had the average per capita income continued to be only 40 percent of the national average. Over the 1933–45 period, the net increase in income of individuals in the Tennessee Valley due to accelerated rate of development amounted to 2.5 billion dollars.[6]

From the 1948 Report:

> The nation is profiting in other ways from its investment in the Tennessee

5. *Annual Report of the Tennessee Valley Authority,* 1947, p. 73.
6. *Ibid.*, p. 4.

TENNESSEE VALLEY AUTHORITY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OFFICE OF GENERAL MANAGER
DIVISION OF PERSONNEL
DIVISION OF LAW
DIVISION OF FINANCE
DIVISION OF PROPERTY AND SUPPLY
OFFICE OF CHIEF ENGINEER
DIVISION OF WATER CONTROL PLANNING
DIVISION OF DESIGN
DIVISION OF CONSTRUCTION
OFFICE OF MANAGER OF POWER
DIVISION OF POWER UTILIZATION
DIVISION OF POWER OPERATIONS
DIVISION OF POWER ENGINEERING AND CONSTRUCTION
OFFICE OF CHIEF CONSERVATION ENGINEER
DIVISION OF CHEMICAL ENGINEERING
DIVISION OF AGRICULTURAL RELATIONS
DIVISION OF FORESTRY RELATIONS
OFFICE OF MANAGER OF RESERVOIR AND COMMUNITY RELATIONS
DIVISION OF REGIONAL STUDIES
DIVISION OF HEALTH AND SAFETY
DIVISION OF RESERVOIR PROPERTIES

Valley region. The proportion of individual Federal income taxes from the seven Valley States has steadily increased, and the cumulative increase from 1933 to 1947 has amounted to $2,000,000,000 additional revenues to the Federal Government.

In 1933, individual income taxes from the seven States were 3.4 percent of the total of such taxes in the nation. In 1947, they were 6.3 percent of the total. Thus the states of which the Tennessee Valley region is a part are sharing more of the common burden of the costs of government.[7]

Local Taxation of Federal Projects. In producing such tremendous additions to the wealth and continuing income of the valley, TVA has added greatly to the taxable base upon which state and local governments must rely for sustenance. It has enabled these governments to expand personnel, salaries, and services. Instead of restricting state and local activities, it has led to their broad expansion. At one point, it is true, state and local governments initially felt threatened by the TVA program on the ground of possible curtailment of the taxable base. Congress forbade state taxation of TVA property. In preparing for the construction of dams, the agency bought up huge tracts of valley land which would be flooded behind the dams, thereby eliminating the land purchased from local tax rolls. Furthermore, in taking over the property of privately owned electrical companies still other property was withdrawn from taxation. Congress took care of the matter, however, by distributing to states and counties in lieu of taxes certain percentages of the gross annual proceeds from sales of electric power. Such payments remove disadvantages which may have been created by the withdrawing of property from taxation. Indeed, in view of the substantial amount of wealth made available for local taxation by the operations of TVA, it has been plausibly suggested that for the state and local governments to collect revenues from it is analogous to taxing Santa Claus for the privilege of coming down the chimney.[8]

7. *Annual Report of the Tennessee Valley Authority,* 1948, p. 6.

8. For articles which throw light on cooperation between the Tennessee Valley Authority and the states, see "A Symposium on Regional Planning," in the *Iowa Law Review*, vol. 32 (January, 1947), which consists of articles by Myres Smith McDougal, Albert Salisbury Abel, Lynton K. Caldwell, Julius Friedrich, Willard Gatchell, Joseph C. Swidler, Robert H. Marquis, C. Herman Pritchett, Robert W. Greenleaf, Morris Llewellyn Cooke, and John M. Drabelle. Among others see also William Pincus, "Shall We Have More TVA's?" *Public Administration Review*, vol. V (Spring, 1945), pp. 148–52; Wesley C. Clark, "Proposed 'Valley Authority' Legislation," *American Political Science Review*, vol. XL (February, 1946); M. H. Satterfield, "TVA-State-Local Relationships," *American Political Science Review*, vol. XL (October, 1946); Committee on Land-Grant Colleges in the Tennessee Valley, Report Prepared by Carleton R. Ball, *A Study of the Work of the Land-Grant Colleges in the Tennessee Valley Area in Cooperation with the Tennessee Valley Authority* (Knoxville, Tennessee, The Committee, 1939), a study made by the Special Committee on Land-Grant College Data and other organizations; the symposium on national water policy in *State Government,* vol. XIX (September, 1946); and an editorial article entitled "Governmental Techniques for Conservation and Utilization of Water Resources: An Analysis and Proposal," *Yale Law Journal,* vol. 56 (January, 1947), pp. 276–303. For some of the legal aspects of cooperation between federal and state governments see Edward S. Corwin, "National-State Cooperation — Its Present Possibilities," *Yale Law Journal,* vol. 46 (February, 1937), pp. 599–623. Other articles which may prove helpful are Frank Bane, "Cooperative Government in Wartime," *Public Administration Review,* vol. II (Spring, 1942), pp. 95–103; Ernest Englebert and Kenneth Wernimont, "Administrative Aspects of the Federal-State Legislative Relationships," *ibid.*, pp. 126–40; Corrington Gill, "Federal-State-City Cooperation in Congested Production Areas," *Public Administration Review,* vol. V (Winter, 1945), pp. 28–33.

OTHER VALLEY PROJECTS

The Missouri Valley. In view of the success of TVA in consolidating many functions for efficient regional handling, capturing the imagination of the entire country, and securing not merely the acquiescence but the hearty cooperation of the states involved, it is not surprising that interested groups have advocated the organization of similar projects to be carried on in other great valleys. The valley of the Missouri River is one of the areas much discussed. The Missouri valley is some thirteen times the size of the valley of the Tennessee. It covers an area about 1300 miles long and 700 miles wide. It includes part or all of ten states — Colorado, Wyoming, Montana, North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa, and Missouri. Like the Tennessee Valley, the Missouri Valley has serious problems which call for solution. It suffers great losses from seasonal floods. It needs the development of electric power for the use of industry and for the improvement of the conditions of both urban and rural living. It needs to devise techniques for preserving the soil and improving its quality. Transportation over its great distances is always a problem. It has an accompanying problem, however, which the Tennessee Valley does not have. There is a great scarcity of water not merely for navigation purposes but for agriculture throughout much of the vast area. Millions of acres of land can be cultivated only by irrigation, and more water than that provided by rainfall is needed in still other areas to produce better crops and protect the soil against wind erosion.

The need for flood control, for the production and distribution of electric power, for the planning of improved navigation, for the distribution of the scarce water supply for irrigation purposes, and for improvement and conservation generally throughout the valley requires action which must cut across the boundary lines of the several states. The success of TVA led many people to advocate the establishment of a Missouri Valley Authority or, if the word authority had too much the suggestion of a super state, a Missouri Valley Administration. Important differences in the situation, however, have delayed repetition of the TVA pattern. The TVA program was undertaken in an area where little had previously been done to solve the problems which became the responsibility of the agency. There was little ground for jealousy on the part of the relatively inactive states or the rival federal agencies with headquarters in Washington.

The situation in the Missouri Valley is different. While TVA was establishing itself, the Army Corps of Engineers, which for many decades has been the principal construction agency in the clearing of rivers and harbors and which has a powerful political backing, was engaged on various projects west of the Mississippi for flood control and navigation. The Bureau of Reclamation of the Department of the Interior, a bitter rival of the Corps of Engineers, was engaged on projects which emphasized irrigation but also included the production and distribution of electric power and the prevention of floods. The Department of the Interior was further

involved in such matters as the control of national parks and supervision of Indian reservations. The Department of Agriculture was concerned with national forests, with the protection of water sheds, and with the conservation and improvement of the soil. The Federal Power Commission was concerned with the selection of sites for dams in navigable streams and the distribution of electric power. These several agencies centered in Washington were, in general, opposed to the establishment in the Missouri Valley of any locally centralized agency which would take away from them the functions which they were already performing. The mutually hostile Bureau of Reclamation and Corps of Engineers, indeed, each of which had its own plans for vast expenditures on development in the valley through its own organization, got together on a compromise program which would divide much of the work between the two agencies. Presumably a major incentive for getting together was to forestall a valley authority which would eliminate both of them from the field.

The position of the Missouri Valley states, furthermore, was different from that of the Tennessee Valley states. The Tennessee Valley states were seemingly reconciled to a continuing low level of prosperity and were taking little action toward their own improvement when the federal government intervened. The newer and more expansive western states, on the other hand, perhaps in the face of a greater or, at any rate, a more dramatic need, showed more aggressiveness in solving their own problems. Although they acted on only a minor scale, they had established various flood control projects and large numbers of irrigation projects where such matters could be handled locally. They had vigorous ideas of their own concerning the development of the valley as a whole. Furthermore, most of the states lie in a traditionally Republican area and voice the traditional opposition of the Republican party to the replacement of private enterprise by expanded federal bureaucracy. Although Nebraska, one of the ten states, is said to be the only state in the Union in which privately owned electrical utilities are not permitted to operate, the electrical industry is, in general, an effective opponent of government ownership and operation. In the management of enterprise generally, while valley people may feel suspicion and hostility toward corporations managed and financed in the East, the federal government, if it extended its operations over local activities there as it has done in the Tennessee Valley, might well be regarded as no less an interloper than the corporations.

The Missouri Valley Plan. As a result of opposition to centralization on the part of federal agencies and the valley states themselves, the federal government utilizes in the Missouri Valley not a single federal agency but a number of them, including primarily the Bureau of Reclamation and the Corps of Engineers, and acts in cooperation with the states not merely in carrying out functions decided upon as in the Tennessee Valley but in planning the program of development as well. The pattern of federal agency control is prescribed by a number of acts of Congress but primarily

by the Flood Control Act of 1944.[9] It is known as the Pick-Sloan Plan, from the names of the representatives of the Corps of Engineers and the Bureau of Reclamation who worked out a compromise between the two agencies. The Corps of Engineers erects dams, as on the main stream of the Missouri River, primarily to improve navigation and flood control. The Bureau of Reclamation erects dams on tributaries where concern is primarily with irrigation and reclamation. No matter which agency engages in dam construction, wholesale distribution of electric power is made by the Bureau of Reclamation. The Federal Power Commission also has certain responsibilities in this area. The National Park Service of the Department of the Interior has responsibilities for national forests, conservation, and other matters.

The Flood Control Act of 1944 recognized the policy-making rights of the states by declaring it the policy of Congress "to recognize the interests and rights of the states in determining the development of the water sheds within their borders and likewise their interests and rights in water utilization and control." It provided that in making investigations preliminary to construction for navigation or flood control purposes, the chief of engineers should proceed in such a manner as to give the relevant information to the state or states involved and should give to these states an opportunity for consultation. Before projects could be undertaken, they had to be submitted to Congress along with other plans which might have been submitted by the affected states or by the Secretary of the Interior.

The machinery of collaboration with the states was not clearly prescribed. It developed in the form of the Missouri Basin Inter-Agency Committee. The parent of that committee was a federal Inter-Agency River Basin Committee in Washington which consisted of the representatives of the several federal agencies involved in river basin development. The Missouri Committee, however, consisted not only of representatives of the federal agencies but also of five of the governors of the ten valley states. This committee has developed in the direction of a kind of planning commission for the valley. It has very little positive power, but its several members represent agencies which do have power, and the committee irons out many of the institutional and regional conflicts. If the state representatives are not in a position positively to make valley policy, they do exert a pronounced influence upon it and, at the very least, they are able to check positive action to which they are opposed.

Some influential residents of valley states, President Truman among them, have continued to advocate a centralized federal agency in the valley. Presumably such an agency would much more effectively and tightly coordinate the several phases of valley development. It might well attempt to extend its influence much farther down into conditions of local living than the present federal agencies have done and, because of the centralization of federal power within its hands, it might curtail substantially the influence of the several states. Although presumably such an agency

9. 58 Stat. 887.

would attempt, as the TVA has done, to keep out of politics in the conventional sense, its operation as a federal agency in a nest of Republican states while the federal government is under Democratic control might produce substantially more friction than results from present operations which reflect only to a limited extent the policies of the New Deal of Franklin D. Roosevelt or the Fair Deal of Harry Truman.[10]

The Columbia River Valley. Regional development in the Columbia River valley is similarly controversial. The river basin includes substantial portions of Washington, Oregon, and Idaho and segments of Montana, Wyoming, and Nevada. The river rises in Canada. With the exception of the Mississippi, it discharges the largest flow of water of any river in the United States. It has tremendous potentialities for the production of electric power and great destructive potentialities in the form of devastating floods. Here, as in the Missouri River valley, action of the federal government to promote the economic welfare of the region has been taken piecemeal and through diverse agencies. The most important steps, taken during the 1930's, were the construction of the Bonneville Dam by the Corps of Engineers toward the mouth of the river where it flows westward as the boundary line between Washington and Oregon, and the construction of the Grand Coulee Dam by the Bureau of Reclamation in northern Washington. At the Bonneville Dam, as at dams in the Missouri valley constructed by the Corps of Engineers, the distribution of electric power was allocated to the Department of the Interior. In this instance, however, instead of using the Bureau of Reclamation as the distributing agency, Congress created in that department the Bonneville Power Administration. This agency was likewise given responsibility for distributing power produced at the Grand Coulee Dam and at various other lesser structures financed and built by the federal government. In a regulation similar to that made applicable to TVA, Congress provided that

> In order to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public and particularly of domestic and rural consumers, the administrator shall at all times, in disposing of electric energy generated at that project, give preference and priority to public bodies and cooperatives.[11]

Because of the absence of centralized planning and administration in the valley, its development was inefficiently organized and the steps taken were inadequate. Although the development of electric power enabled the northwest to play a prominent part in production during World War II, the total of power available proved inadequate to the potentialities of the region. Seasonal floods, furthermore, continued to destroy immense

10. For discussion of the possibility of establishing a Missouri Valley Authority or a Missouri Valley Administration, see a number of the articles cited above in note 8. See also Henry C. Hart, "Valley Development and Valley Administration in the Missouri Basin," *Public Administration Review*, vol. VIII (Winter, 1948), pp. 1–11. See also materials indexed in the *Congressional Record* for recent years.

11. 50 Stat. 733.

quantities of property. The creation of a central agency corresponding to the Tennessee Valley Authority, while vigorously advocated by many people of the region, was opposed by those local politicians who feared the further extension of control from Washington, by private power interests who feared further encroachment of the federal government upon what they regarded as their own domain, and probably also by the diverse federal agencies which wished to retain their respective jurisdictions in the valley.

Discussing the problem of valley development at Seattle in June, 1948, President Truman declared that

> What we have done in the Tennessee Valley, we can do elsewhere. We have already been moving in that direction in other great river basins — such as the Missouri, the Colorado, the Central Valley in California, and the Columbia. Our purpose is the same in all of them — to conserve and use water, instead of wasting it. But to achieve that simple purpose, we must follow a great concept of unified development of all the resources of each area.[12]

In January, 1949, evidently regarding his victory at the polls as a mandate to go ahead with the program, President Truman directed the several federal agencies involved to prepare a plan for submission to Congress which would provide for establishment of a Columbia Valley Authority. He was seeking not only the kind of collaboration by which in 1944 the Bureau of Reclamation and the Corps of Engineers had divided between them the development work of the Missouri River valley but also agreements as to a central agency to which the operations of other federal agencies in the Columbia River valley would be subordinated. The President's proposal immediately raised a clamor about federalization of the rights of the states. It was said that

> President Truman has asked members of his Cabinet to draft a bill setting up a Columbia Valley Authority. Within hours the National Association of Electric Companies, the registered lobby for private power interests, issued a statement condemning the action as the first step "to create a superstate." [13]

It was clear that, because of the great variety of differences between the Tennessee Valley and the Columbia Valley, any centralized federal agency would have to differ considerably from TVA. One of the proposals was that an advisory council appointed by the governors of the states involved would play a prominent part in the project. In any event, it would be difficult and time-consuming to work out a series of acceptable arrangements for the new agency to be established, the federal agencies already in the field, the state and local governments of the area, and the private corporations which would be affected by government competition or control.

The Central Valley of California. Other important river valleys include

12. *New York Herald Tribune,* June 11, 1948.
13. *Christian Science Monitor,* January 27, 1949, as quoted in the *Congressional Record,* January 31, 1949, vol. 95, part 12, p. A460.

the territory of a number of states and require the attention of the federal government if development is to take place with any degree of uniformity. Among them are the valleys of the Colorado, the Connecticut, and the St. Lawrence. The situations and the problems differ one from another, but the relations of the government to the states, of federal agencies one with another, and of government to private enterprise are always involved. In the larger states where the river development needed is so extensive and costly as to be beyond state capacity, the federal government may undertake extensive responsibility even where cutting across state lines is not involved. The Central Valley of California provides an example. There, among other projects, the Bureau of Reclamation has undertaken construction of a canal more than 150 miles long to carry water across into the semi-arid valley of the San Joaquin. Although California is hardly less jealous of its sovereignty and less fearful of the encroachment of federal authority than other states of the Union, it discriminates in its resistance to the exercise of federal power. It welcomes the construction of the canal at federal expense, but it protests against the provision of federal law which seeks to aid small farmers by limiting to 160 acres the amount of land under single ownership or 300 acres for a man and wife which may be irrigated with waters from a federal reclamation project.[14]

The California legislature early in 1949 petitioned Congress for an increase in federal expenditures to be made in the state for flood control. In support of its argument it outlined needed expenditures to the total of nearly $70 million and noted that the state legislature had appropriated $25 million to pay the cost of local participation.[15] In California as well as in other states, however, the economic and social justification of the governmental expenditure of large sums of money for the construction of flood control dams depends in part upon the generation of electric power and the distribution of that power to the widest possible range of consumers. There, as in other states, private power interests become involved in flood control programs by their opposition to government distribution of power at low cost. The fact was illustrated by a paragraph in President Truman's Seattle speech of June 10, 1948, mentioned above.

> The private power lobbyists are still fighting. Where they can't block the production of public power, they're trying to block its distribution at low cost. For example, down in California, Shasta Dam has begun to turn out power. If that power is to be used for the people's benefit, it must be moved over the transmission lines to the areas where it's needed. But the Congress has blocked the building of the necessary transmission lines year after year. This has been at the expense of the public, and to the benefit of a private company. This is the same company which has so little faith in the future of the West that it failed this spring to be ready to furnish vitally needed power. As a result, the whole of northern California had to resort to a "brown out." [16]

14. See *New York Times*, March 14, 1948.
15. *Congressional Record*, February 9, 1949, vol. 95, part 12, p. A672.
16. *New York Herald Tribune*, June 11, 1948.

These discussions of federal regional activities in conservation are intended to illustrate not primarily the story of conservation itself, but rather the relations between the federal government and the states in such matters. These relations are badly entangled. The entanglement is made more confusing by the jurisdictional clashes among federal agencies such as the Bureau of Reclamation and the Corps of Engineers and the encroachment of private enterprise which seeks to escape government competition or outright replacement by government agencies. Much of the confusion is probably inevitable as long as we find it desirable to preserve a federal system and along with it a system of so-called free enterprise with powerful corporations as its instruments. However, in the light of the conflicts among existing federal agencies, it seems improbable that confusion and conflict would be eliminated even by merging all state authority in the federal government and completely excluding private corporations from the public utility field. The federal government must maintain administrative agencies to carry out its functions and must rely heavily upon the advice of these agencies in making policy. Rivalries among them are inevitable and, as in private enterprise, are perhaps only in part undesirable.

INTERSTATE COMPACTS

Compacts for Water Distribution. Regional problems which cut across state lines are sometimes dealt with through compacts among the states involved. The subject has a place in a study of the federal government because such compacts are valid only when the consent of Congress is given. The Constitution provides in Article I, Section 10, that no state shall enter into any treaty, alliance, or confederation, and without the consent of Congress no state shall enter into any agreement of compact with another state. For varied purposes, states have sought the consent of Congress to compacts with other states. Important among them are compacts having to do with the division of water from flowing streams. The compact device is calculated to keep jurisdiction in the hands of the states, even though more states than one are involved, instead of turning it over to the federal government. Its use slows down somewhat the trend toward centralization which characterizes generally the activities of government in the United States.

Congress, however, must, as the constitutional provision suggests, keep a watchful eye upon compacts made between states. Presumably the original requirement of congressional sanction of any such compact was to prevent groups of states from forming regional confederations which might do injury to other states or to the Union as a whole. In scrutinizing compacts for the allotment of water from flowing streams, Congress must see to it that the agreement which is to bear congressional sanction must not dispose of rights which are properly under the jurisdiction of the federal government and not of the states. In 1937, for example, the four states of

the Connecticut River Valley entered into a compact to provide for flood control. The compact extended, however, to the production and distribution of electric power over which the federal government claimed jurisdiction. The Federal Power Commission looked into the matter and reported on it to President Roosevelt who, as a result, successfully opposed the congressional authorization of the compact.[17]

In 1942 President Roosevelt vetoed a bill granting the consent of Congress to a compact entered into by Colorado, Kansas, and Nebraska for the use of waters of the Republican River basin. He stated that he approved of the compact as a device of apportioning waters for irrigation and related uses. He found this particular compact defective, however, in that it denied the jurisdiction of the United States over the waters of the Republican basin for purposes of navigation and appeared to restrict the authority of the United States to construct irrigation works and to appropriate water for irrigation in the basin.[18] The compact was modified and subsequently approved.[19]

The Making and Interpretation of Compacts. States may either enter into a compact among themselves and then present it to Congress for approval or they may begin by asking congressional authorization to make such a compact. The action of each state usually includes legislative authorization for appointment of a commissioner who will meet with commissioners of other states to negotiate the compact and legislative ratification of the compact after it has been drafted. Whether or not the making of such a compact has been authorized by Congress, it must thereafter receive congressional approval if it is to be valid.

If participation of the federal government is in any way involved, Congress may authorize appointment of a representative of the United States to participate in the negotiation of the compact. Such was the case in the drafting of the Colorado River compact, which involved an agreement along broad lines among seven western states on the allocation of water from the Colorado River, with the understanding that the federal government was to construct what has been variously known as Boulder Dam and Hoover Dam to make possible the effective use of both water and electric power. Interstate compacts do not necessarily solve all problems related to the subjects with which they deal. Because the interests involved in the distribution of water from the Colorado River were so tremendous, the several states were able to agree only in a general way on the allotments to be made. California and Arizona, therefore, continue to dispute over their respective rights to water, whether those rights are derived from the compact or from some other source. Thus Arizona, in the face of Cal-

17. See "The States vs. the Federal Government," *State Government,* vol. X (December, 1937), pp. 255–57. For discussion of this and other compact issues, see Jane Perry Clark, *The Rise of a New Federalism* (New York: Columbia University Press, 1938), pp. 71 ff.
18. *Congressional Record,* April 2, 1942, vol. 88, part 3, pp. 3285–86.
19. 57 Stat. 86.

ifornia's opposition, has recently sought expenditure of huge sums of federal money within Arizona for the development of arid land and the allocation to it of quantities of water which are sought also by California. In this instance, the weight of presidential opposition blocked the Arizona development.[20]

Miscellaneous Compacts. Until the 1930's, compacts were employed primarily to settle boundary disputes between or among states, to allocate western waters as discussed above, and to provide for the construction of interstate public services as in the instance of the New York Port Authority which, among other things, builds and operates interstate bridges and tunnels. In more recent years compacts have been made for the use of fishery resources, the prevention of pollution of streams, interstate supervision of persons whom courts have placed on parole or on probation, allocation of petroleum production, establishment of park and recreational systems, and other purposes.[21] It is an obvious fact that many of these compact arrangements permit the regional handling under state jurisdiction of problems which, in the absence of such a device, would either go unsolved or would pass into the hands of the federal government. Use of the device is on the increase. It does not, however, operate so successfully as to defeat the broad trend toward centralization of power in the federal government. A compact can settle matters which can be settled once and for all, such as the location of a boundary between states. It may permanently settle disputes over percentage rights to the flow of particular streams. Agencies set up by interstate compacts for continued administration, however, are frequently hampered by lack of freedom of action which derives from the fact that, as creatures of a number of states, they must serve a number of masters. The federal government, particularly when it operates through a single agency such as the Tennessee Valley Authority, can achieve an effectiveness and a forthrightness of action seldom possible for an agency whose existence is derived from multiple state sources. In other words, the interstate compact is a valuable device for many purposes, but it is not the panacea which many people have hoped.[22]

Whether they operate by interstate compacts, or federal valley authorities, or collaborative groups of federal and state agencies, these concentrations of power which overlap state lines represent a modification of our original federalism. They are not primarily either state or national, but regional. Since the Constitution makes no place for regional government which does not conform to state lines, we have had to adapt the constitutional structure to the needs of the times. Interstate compacts usually mark

20. See *Congressional Record*, February 14, 1949, vol. 95, part 12, p. A787.
21. For discussion and a list of such compacts, see *The Book of the States, 1948–49*, pp. 27–52.
22. For additional materials on interstate compacts, see various of the articles in the symposium from the *Iowa Law Review* cited above, note 8, and the article by Edward S. Corwin likewise there cited, together with the materials cited in those articles and in Jane Perry Clark, *op. cit.*

the least deviation from state control, while valley authorities and even giant power and irrigation projects administered through the Bureau of Reclamation mark a shifting of local responsibilities to the federal government. True, valley authorities and the local establishments of Washington agencies develop local interests and attitudes which may be largely unfamiliar to Washington offices, and they integrate their work in various ways with those of state and local governments. This integration may represent a creative federalism with far more social value than comes from the suspicious watchfulness of each government over all powers exercised by the other. This point, however, can be better discussed in connection with other materials in the following chapter.

References

William Anderson, *Federalism and Intergovernmental Relations, a Budget of Suggestions for Research* (Public Administration Service, 1946).

Jane Perry Clark, *The Rise of a New Federalism* (Columbia University Press, 1938).

Donald Davidson, *The Attack on Leviathan; Regionalism and Nationalism in the United States* (University of North Carolina Press, 1938).

R. L. Duffus and C. Krutch, *The Valley and its People; a Portrait of T.V.A.* (Knopf, 1944).

Merle Fainsod and Lincoln Gordon, *Government and the American Economy* (Norton, 1941).

Herman Finer, *The T.V.A., Lessons for International Application* (International Labor Office, 1944).

Alvin H. Hansen and Harvey S. Perloff, *Regional Resource Development,* (National Planning Association, pamphlet, 1942).

David E. Lilienthal, *T.V.A. — Democracy on the March* (Harpers, 1944).

Howard W. Odum and Katharine Jocher (eds.), *In Search of the Regional Balance of America* (University of North Carolina Press, 1945).

Roscce Pound, Charles H. McIlwain, and Roy F. Nichols, *Federalism as a Democratic Process* (Rutgers University Press, 1942).

C. Herman Pritchett, *The Tennessee Valley Authority, a Study in Public Administration* (University of North Carolina Press, 1943).

United States National Resources Committee, *Regional Factors in National Planning and Development* (Government Printing Office, 1935).

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The Nation and the States

In addition to the development and control of natural resources in which regional operations have been necessary, and the handling of other regional problems, the federal government and the states make contact in various fields. These include education, public health, social security in its various aspects, housing labor problems, banking, farm problems, aid to veterans, the control of monopolies, taxation, and many others. The federal and state governments collaborate informally at innumerable points. To illustrate from the administrative field, the activity of local agents of the Department of Agriculture so merge with those of state and county agricultural agents that it is often hard to draw a line between them. State banking departments and offices collaborate with agents of the Federal Reserve System. Information is shared about income tax returns. Particularly in time of war, state governors attempt to conduct administration in harmony with federal programs. Coast Guard employees who investigate smuggling, Secret Service men who investigate counterfeiting, and FBI agents who investigate the violation of various federal statutes share information with state and local police and in turn receive information from them. The FBI conducts a police school for state and local police officers.

The jurisdictions of state and federal courts overlap somewhat, and courts of each jurisdiction give assistance in the other. There is a measure of legislative collaboration as well. During the New Deal period, for example, many states enacted labor relations measures to supplement the National Labor Relations Act.[1] Early in World War II, many state legislatures enacted the basic provisions of statutes drafted in Washington to deal with matters of local defense. At the opposite pole, state legislatures send innumerable memorials to Congress urging action or inaction on various proposals. Such memorials appear in the daily issues of the *Congressional Record.* In short, the federal and state governments have infinite inter-relationships which give us many of the characteristics of a single operative system.

1. See Charles C. Killingsworth, *State Labor Relations Acts* (Chicago: University of Chicago Press, 1948).

FEDERAL GRANTS TO STATES

Historical Background. Apart from the innumerable activities which merely reflect smooth meshing of the machinery of state and federal governments, the intergovernmental relationships divide between those in which the federal government gives aid to promote the activities of the states and those in which, through one branch or another, it curbs state activities. Although the states originally claimed to be sovereign and as sovereign governments admitted their obligation to raise their own revenue and pay their own debts, the federal government began very early to make grants of various kinds to the states. The practice expanded to a point where, in 1939, a total of more than $2,900,000,000 was spent in federal grants.[2] The first step in this direction was taken in 1790 when, as a part of the fiscal program worked out by Alexander Hamilton, the first Congress authorized the federal government to take over and pay the debts hitherto incurred by the several states. Another substantial donation was made in 1837, when, embarrassed by a surplus in the federal treasury, the government, nominally in the form of loans but actually as grants, distributed to the states some $28 million.

More important in establishing the pattern of federal grants to states, however, was the process initiated during the early years of allotting government-owned land to the states for educational purposes. Public land in various western areas was divided into townships six miles square. These in turn were divided into thirty-six sections, each of one square mile or 640 acres. In disposing of public land the federal government set aside one of the thirty-six sections in each township for educational purposes. This section was usually sold to provide funds for common school education. At a later period in certain areas more than one section was allotted for the support of common schools. Moreover, in certain states, two entire townships in each state were set aside to provide funds for higher education.

This pattern of granting specific tracts of land to states for educational purposes led naturally to the program initiated by the Morrill Act of 1862, whereby large tracts of public land were donated by the federal government to establish what are commonly called land grant colleges. One of the functions of such colleges was to promote agriculture. It was a natural step thereafter to the making of grants for agricultural experiment stations and agricultural extension services of various kinds. Early in the twentieth century, with the development of the automobile and the increase in importance of long distance highway transportation, the federal government began to make grants for the building of roads. From road building the practice extended gradually to various other fields and then flowered out tremendously in the New Deal period as federal expenditures were utilized to stimulate recovery from the depression and provide relief for distressed groups and communities. World War II brought some reduc-

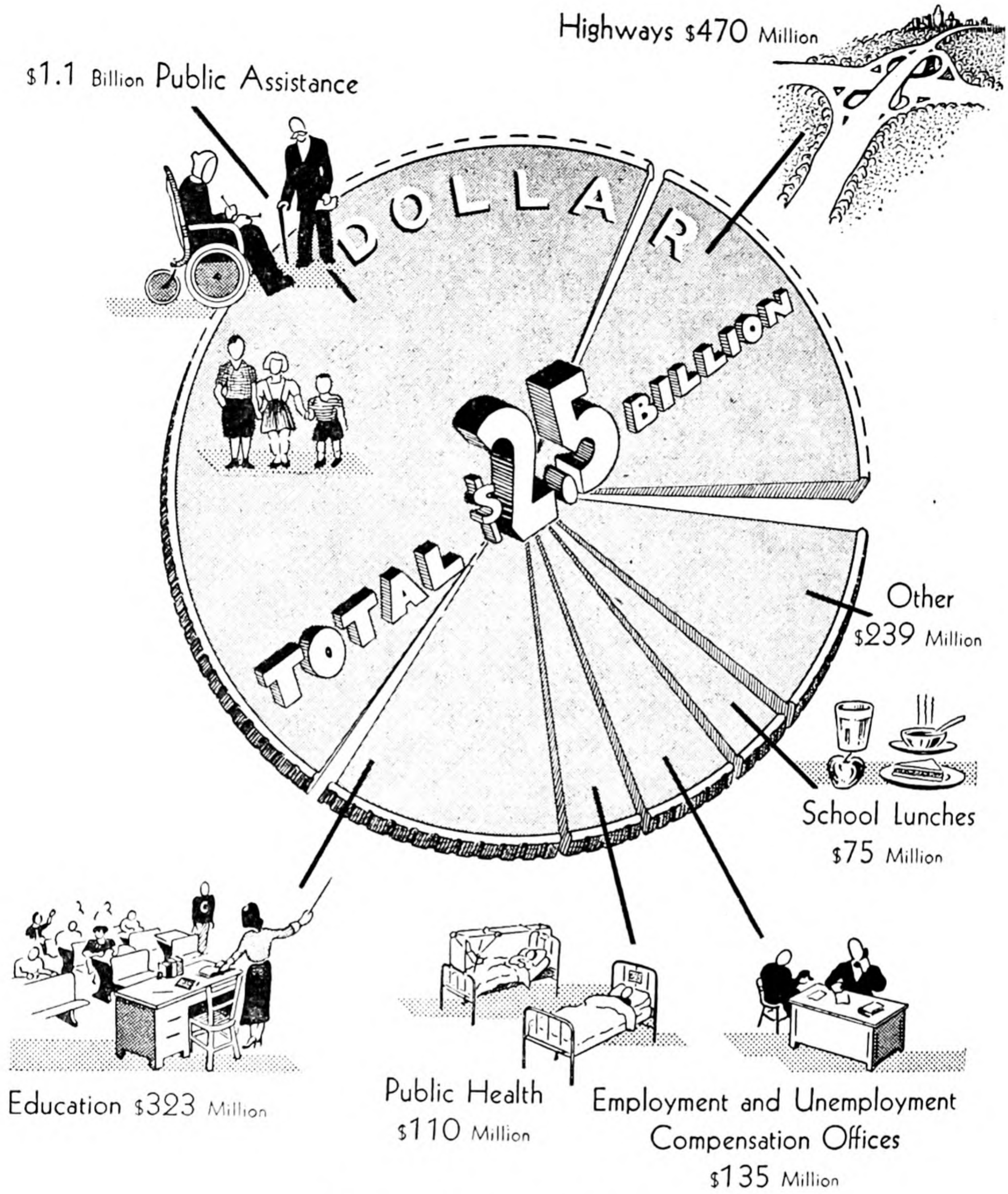
2. *Congressional Record*, February 2, 1949, vol. 95, part 12, p. A471.

tion in the totals of grants and a shift in character to those which would facilitate the war effort. The postwar period brought renewed expansion with an estimated total of more than $1,900,000,000 for the fiscal year 1949, and with the requests on the part of the President for more than $2,500,-000,000 for the year 1950.[3]

Grants-in-Aid and Federal Control. The federal assumption of state debts in 1790 laid no responsibility of any kind upon the states. Neither did the donation of federal surplus funds in 1837. While early grants for educational purposes prescribed the use to which funds were to be put, they made no provision for federal inspection or control. With the expansion of its grants, however, the federal government began gradually to prescribe the conditions under which they would be made and to provide means for checking upon administration. It has been an inevitable part of the process of making grants-in-aid to states, in other words, that a measure of federal control should accompany the funds given. This control or the threat of its exercise has provided excuse for opposition by people who fear the subordination of the states to the federal government even in the conduct of local affairs. No state, it is true, is legally obligated to accept a federal grant. The difficulty is that the availability of federal funds immediately raises a clamor on the part of local people for the benefits of the offered donations. In order to get the donations, the state must usually provide funds of its own for the project. The ratio of state-federal expenditure varies, but for a time so many statutes required the matching of federal funds by the states that grants-in-aid came to be known as "fifty-fifty legislation." For highway programs, social security programs, and many others, the states must now prepare plans and submit them to the federal government for approval before funds will be provided. They must make reports to the federal government and, to a varying extent, submit to inspection of administration. The federal government may prescribe machinery of administration as, for example, in the requirement that state employees used in administration shall be selected and protected by a merit system. Important also, if less tangible, is the effect of continued association between state employees and employees of the federal government who prescribe policy and control the flow of federal funds. In connection with the various federal aid programs, a permeating influence from federal bureaus extends far into the machinery of state governments.

Purposes of Grants-in-Aid. Since the people who pay taxes to the federal government are generally the ones who pay taxes to the states, it is widely contended that, whatever the situation may have been in earlier years, there is now no justification for federal grants for local expenditure with the consequent extension of federal influence into the state sphere. There are various reasons for the expanding use of the device. One of them is the

3. *Ibid.* For the most recent comprehensive study of the subject see Council of State Governments, *Federal Grants-in-Aid* (1949).



FEDERAL GRANTS TO STATES

(Bureau of the Budget)

desire to aid the financially poorer states by allotting to them funds raised from income taxes and other revenues which have been collected primarily in the wealthier states. It is contended, for example, that the well-being of the nation as a whole requires improvement in the standards of education and health in the low-income states of the South and other areas.

Another reason for using the device is to persuade states to adopt policies which, whatever the condition of their treasuries, they would not be willing to adopt without the tempting offer of federal funds. Some years

ago, irritated by the indirect coercion involved in the offer of federal funds to promote maternity welfare on the condition that the states match those funds by contributions of their own, Massachusetts brought suit to contest the constitutionality of the federal measure. The Supreme Court held, however, that Massachusetts was not compelled to accept the federal offer and that therefore no legal coercion was involved.[4] There are various fields in which states now accepting federal grants would make no comparable expenditures if the federal grants were not available. One reason for their reluctance often lies in the influence of those people or corporations which bear the heaviest part of the burden of local taxes and which exert such strong political influence as to prevent local expenditures even when desired by the masses of the people. Another reason is that the borrowing power of the states is often limited both by available local funds and by state constitutional provisions, whereas the federal government is able to borrow seemingly without limit.

Whatever the merits and demerits of the grant-in-aid, its use now spreads over a wide field. A recent edition of the *Book of the States* classifies federal grants under the following eight headings: Veterans' Services and Benefits; Social Welfare, Health, and Security; Housing and Community Facilities; Education and General Research; Agriculture and Agricultural Resources; Natural Resources not primarily Agricultural; Transportation and Communication; and Labor. In addition to making grants in these fields, the federal government shares with the states income which it acquires through the activities of the Federal Power Commission, the Bureau of Reclamation of the Department of the Interior, the Army Corps of Engineers, the Forest Service of the Department of Agriculture, the Tennessee Valley Authority, and other agencies.

Congress and the people are currently debating the amounts of federal grants to be made for housing, highways, the promotion of public health, and the improvement of education. There are conflicts among interests which would benefit or suffer by the expansion of federal programs and among people who fear or who desire the uniformity which results from extension of federal policy in these matters throughout the country whatever the conflicts between that policy and the policies of local areas. The situation is not so simple as that one group is right and the other is wrong. For example, there may be both gains and losses in federal statutes which require that as a condition of the receipt of federal funds the states must pay wages to employees at given levels and submit to various other restrictions.

These problems involve academic as well as political and economic institutions. One proposed federal control which would bring heated controversy to academic halls was a measure introduced in Congress early in 1949 to curb "bigotry in education." The representative who introduced the bill inserted in the *Congressional Record* magazine articles exposing the undemocratic character of college fraternities. He found it incongruous

4. *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923).

that while the United States was spending millions of dollars abroad in support of democracy, "federal funds are spent in this country to maintain colleges and schools which discriminate against students by reason of race, color, religion, ancestry, or national origin, and where fraternities hold sway whose membership is chosen on anything but the theory that all men are created equal." [5] He therefore introduced a bill to withhold all federal aid from schools "which discriminate between students by reason of their race, color, religion, ancestry, or national origin, or which permit students to be members of student organizations which so discriminate." [6] If such a bill were phrased to include the expenditure of G.I. benefits and contract expenditures for research work which many universities do for the federal government, it would extend federal control to the personnel policies of the universities, to all college fraternities, and presumably even to informal organizations within student bodies.

Some southern leaders oppose widespread federal aid to education because of the belief that it would mean the end of racial segregation in education. The following excerpt from a speech by Senator James O. Eastland, of Mississippi, provides an example:

> Because of the position of the [Supreme] Court, because of the drive to destroy the South, because of the attempt by the use of force of the federal government to remold us to the image desired by agitators who know nothing about our conditions or our problems, I cannot and will not support anything which could in time give the federal government any voice in the control of our school system either white or black. We cannot permit our schools to become dependent upon federal aid, and I shall certainly oppose any appropriation of federal funds for maintenance of or the operation of the schools of the country. I am afraid that American democracy is doomed if we have federal bureaucratic control of the school system. With the present political complexion of the country it is plain to me that a program for federal aid for schools is the most dangerous proposition that has ever faced us. I shall oppose it to the limit and I hope if it is ever enacted my state of Mississippi and all Southern states will refuse to accept federal funds.[7]

It remains to be seen what will happen if and when the federal government greatly expands its appropriations for aid to public education. However, people who oppose federal aid in general, and not merely in education, because of its threat to local control, should bear in mind one important fact. Most federal aid projects have some relation not only to local welfare but also to the jurisdiction of the federal government itself. Therefore, while a decision not to aid state activity in a particular field may possibly mean that no activity in that field will take place, it may mean something very different. That is, the federal government, acting directly, may assume jurisdiction without seeking state collaboration and

5. *Congressional Record*, February 16, 1949, vol. 95, part 12, p. A838.
6. *Ibid.*, See H. R. 1642, 81st Cong., 1st sess. For materials on federal grants in the several fields see the study of the Council of State Governments, cited above, and congressional hearings and reports and debates on bills introduced to authorize grants in the several fields.
7. *Congressional Record* (temporary daily edition), June 22, 1950, p. 9172.

without directing a flow of funds through state channels. The grant-in-aid device, in other words, is in part a device for permitting primarily local administration of activities which, if not administered locally, will be administered by the federal government. If making federal grants to states tends toward the centralization of power in the federal government, the tendency is much less drastic than would be the alternative of direct and full exercise of federal power.[8]

OTHER AID AND COLLABORATION

Military Aid. The federal government provides various other forms of aid, including that which it gives by means of military forces in coping with domestic violence. Article IV, Section 4, of the Constitution provides that

> The United States shall guarantee to every state in this Union a Republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

Before the Civil War, states on a number of occasions called for the aid of federal troops to meet challenges to their authority. Since the Civil War, direct rebellion against state authority has seldom occurred, but states have frequently called for federal military aid when local police or perhaps even local troops have been unable to quell strife between employers and workers. Presidents have occasionally sent troops for use under such circumstances, but they are reluctant to employ military forces to settle controversies which ought to be settled by very different tactics. In times of crisis, it is true, and in critical fields such as railroad transportation and coal production, the national welfare may be so involved as to compel federal intervention. When that occurs it is usually better to use the injunctive power of the federal courts or to assume control of plants and forbid strikes against the federal government than to send federal troops to quell disturbances over which the federal government lacks full jurisdiction.

Aid in Civilian Crises. State governors call for the aid of federal troops not only to cope with violence but also to meet crises resulting from floods, fires, hurricanes, snow storms, and other disasters. The troops which are frequently sent for such purposes help to restore order, save lives, and recover property in the devastated areas. They help distribute food, clothing, medicine, and other supplies. Early in 1949 military forces in the western states were used to relieve distress from severe snow storms.

8. The Hoover Commission found the problem complicated and made only limited recommendations. It recommended a study of functions to determine the governmental levels at which they could be best performed; revision of tax systems to leave to the localities and states adequate sources of revenue; better budgeting and administration of grant-in-aid funds; clarification and systematization of the grant-in-aid plan and program; and establishment of a continuing federal agency on federal-state relations for study, information, and guidance.

Transport planes were used to drop food to marooned people and hay to starving livestock. Bulldozers and other equipment were used to open highways, and government trucks were used to transport people and supplies, all on the basis of emergency funds voted by Congress to meet the crisis with which the states were unable to cope. In imitation of more aggressively military ventures, the project of feeding livestock from the air was nicknamed "Operation Haylift."

FEDERAL RESTRICTIONS ON THE STATES

With forty-eight — or eventually fifty — states exercising authority in a sphere overlapping with that of the federal government and in conjunction with outright prohibitions in the Constitution, it is inevitable that they should occasionally exceed their lawful powers and require restraint. This does not imply a tendency toward greater unlawfulness or more overweening ambition on the part of the states than of the federal government. Nor does it mean that most of the states are eager to tax and spend for projects now being supervised and paid for by the federal government. State politicians often invite and urge federal construction of highways and other public works, federal housing projects, federal relief expenditures, and other projects which will contribute to state prosperity without adding to tax levies. Rather, state activities in excess of power are likely to include such items as illegally taxing or otherwise interfering with interstate or foreign commerce, taxing or otherwise burdening federal property or federal functions, denying personal or property rights protected by the Constitution, and refusing to give to the activities of other states the "full faith and credit" which the Constitution requires.

The Constitution was drafted by men who hoped to establish a strong central government and relegate the states to definitely subordinate positions as far as non-local matters were concerned. The ratifying conventions hotly debated the curtailment of state powers and the establishment of a super-state by which the states were to be overshadowed. After the Constitution went into effect, the controversy over centralization versus state rights represented a major constitutional issue and an issue between the major political parties — at first, for example, between the Federalists and the Jeffersonian Republicans. In differing over the issue the parties differed also over the question whether the federal government or the states would be the interpreters of the Constitution. Jefferson and Madison, speaking anonymously through the Kentucky and Virginia Resolutions of 1798, argued that the states shared in the power to interpret the compact to which they were parties and to intervene if the federal government exceeded its powers. The Supreme Court, however, acting usually under the leadership of Chief Justice Marshall, handed down over a third of a century a series of important decisions which established the Court itself as the

final authority on the Constitution and defined the essentially subordinate position of the states in the Union.[9]

Nullification and Secession. During the fourth, fifth, and sixth decades of the nineteenth century, relations between the states and the federal government grew at once less strained and more so. The Supreme Court, headed by Chief Justice Taney with other justices less ardent in their federalism than many of Chief Justice Marshall's colleagues had been, viewed state action with a broader leniency than had the Court during the earlier period. The rights of states to exercise their police powers were broadly recognized. Even so, lines had to be drawn somewhere between state and federal authority, and the controversies in the Court, reflecting those in the country at large, grew more intense. In the early 1830's hot-headed political leaders in South Carolina, resentful of federal tariff legislation injurious to their interests, announced plans to nullify the federal law. President Andrew Jackson averted the crisis by announcing his intention to use the military to put down any nullification movement and at the same time persuading Congress to lighten the tariff burden against which the South rebelled. Two decades later the nullification movement shifted to the North, where Wisconsin defied the federal fugitive slave law and the federal courts by releasing from prison a violator of that statute who had been convicted in a federal court. The Supreme Court held unconstitutional this act of nullification,[10] whereupon the Wisconsin legislature denounced the action of the Supreme Court and declared that "as in all other cases of compacts between parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress."[11] The definite subordination of the states within the Union, in other words, and their inability to define the exercise of federal power, remained yet to be established where sensitive state interests were involved.

Proof of state subordination came with the Civil War, which determined by force of arms that no state had the power to defy or to leave the Union. After the war the Supreme Court rationalized the military outcome in constitutional terms, declaring that "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states."[12] The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitu-

9. Especially *Ware* v. *Hylton*, 3 Dallas 199 (1796), *Martin* v. *Hunter's Lessee*, 1 Wheaton 304 (1816), *Fletcher* v. *Peck*, 6 Cranch 87 (1810), *Dartmouth College* v. *Woodward*, 4 Wheaton 518 (1819), *Sturges* v. *Crowninshield*, 4 Wheaton 122 (1819), *McCulloch* v. *Maryland*, 4 Wheaton 316 (1819), *Osborn* v. *Bank of the United States*, 9 Wheaton 738 (1824), *Gibbons* v. *Ogden*, 9 Wheaton 1 (1824), and *Craig* v. *Missouri*, 4 Peters 410 (1830). For discussion of these and other cases see Carl B. Swisher, *American Constitutional Development* (Boston: Houghton Mifflin, 1943), Chapters 4 and 6.

10. *Ableman* v. *Booth*, 21 Howard 506 (1859).

11. Charles A. Beard, "The Constitution and State Rights," *Virginia Quarterly Review*, vol. XXI (October, 1935), p. 487.

12. *Texas* v. *White*, 7 Wallace 700, 725 (1869).

tion in effect supported that position and laid further restrictions on state powers.

The States After the Civil War. The decades immediately following the Civil War witnessed additional curbing of state powers. The dominant attitude toward the Constitution during the last third of the nineteenth century is suggested by the title of a book written by Thomas M. Cooley in 1868 which reads as follows: *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union.* The book, republished thereafter in many revised editions, reflected the interest of constitutional theorists in defining the limits of state authority, and reflected also the resistance of newly powerful business interests to state regulation.

The restrictions on the states expressed in the Thirteenth, Fourteenth, and Fifteenth Amendments were at first intended primarily to protect the newly acquired rights of the one-time slaves. Both administratively and through the courts, the federal government attempted to give that protection, but found it difficult in the face of hostile sentiments among southern white people. In the meantime, under pressure from skillful lawyers, the courts began to interpret the due process and equal protection clauses of the Fourteenth Amendment as protecting against the states the rights of other people than Negroes, including particularly the rights of property. The power of business corporations and the influence of corporation lawyers were growing rapidly. This dominant fraternity succeeded in persuading the Supreme Court that corporations were "persons" within the meaning of the Fourteenth Amendment and that as such they were entitled to many of the protections which that amendment conferred on natural persons.

This expansion of corporate protection against state regulation marks a fascinating development in our history. It came about as corporation lawyers bedinned the ears of the courts with warnings of the menace of socialism and communism, parading corporate business as the essence of individualism. Actually the growth of business corporations marked the development of our own peculiar brand of collectivism, a collectivism which, whatever its defects, has brought about tremendous concentrations of economic power and has been highly productive of economic goods. Since there is no such thing as complete separation of economic and political power, what occurred was the development of quasi-political units as well, with business corporations operating as rivals of the states by which nominally they were created and persuading the courts to interpret the Constitution so as to give them protection against drastic state regulation. Behind the scenes, indeed, we developed a new pattern of federalism which included, and still includes, business corporations as well as states as effective units of power. The corporations retained much of their influence with the federal government in curbing state power until the New Deal period, when the federal government expanded its own power at the expense of corporations, which had considerable dynamics left in

them, rather than of the states, which as a result of the depression were primarily supplicants for federal aid.

FEDERAL POWERS AS BARRIERS TO STATE ACTIVITY

The Commerce Power. Often the mere existence of a federal power, and in any event the exercise of it, precludes the exercise of state power in the same field even when the Constitution contains no specific prohibition. The federal commerce power is an important example. While according to a century-old Supreme Court decision the states may regulate peculiarly local aspects of interstate and foreign commerce in the absence of federal regulation,[13] such commerce is now deemed largely withdrawn from state jurisdiction. The states can exercise broad control only if they can approach the subject from a different angle than that of commerce, such as protection of the health, safety, and morals of the people, when they are said to be exercising state police powers rather than the power to regulate commerce. Most aspects of interstate railroad business, for example, are beyond the range of state control.[14] Yet, by virtue of its police powers a state may enforce health and moral regulations even as to interstate passengers. The more complete the coverage of interstate commerce by federal law, the less jurisdiction remains to the states.

Since each state has jurisdiction only within its own borders, states acting singly are in no position to regulate enterprise networks, whether railroad or otherwise, which spread across state lines. It has therefore naturally come about that federal courts have held unconstitutional state regulations which sought to extend power across state lines and have created thereby a kind of vacuum which has been filled eventually by the expanding regulatory power of the federal government. Constitutional curtailment of state regulatory power, in other words, as based on the commerce clause, usually comes to mean not the prevention of regulation altogether but the replacement of the states by the federal government as the regulatory agency. Since the states are likely to be less effective than the federal government in the regulation of powerful business corporations, it is not surprising that in recent years big business interests have pretended deep concern over alleged federal encroachment upon the proper jurisdiction of the states.

State Taxes on Interstate and Foreign Commerce. Many Supreme Court decisions have turned on questions as to when interstate or foreign commerce begins and ends. The states are particularly concerned to know when they do or do not have jurisdiction to tax articles of commerce. To foreign commerce and presumably to some extent also to interstate commerce, the "original package doctrine" announced by the Supreme Court

13. *Cooley* v. *Board of Wardens*, 12 Howard 299 (1851).
14. Interstate compacts, even if constitutionally feasible for such a purpose, would be unlikely to provide powerful and at the same time flexible regulatory machinery.

in 1827 [15] still applies. The Court then held that goods imported into the country were not subject to state taxation until they had been mixed with the property of the state either by sale or by the breaking of the "package" in which they were imported. In interstate commerce, however, as distinguished from foreign commerce, the courts primarily concern themselves not with matters of packages or sales but with whether or not taxes levied on property fall with peculiar heaviness on articles which have moved in interstate commerce. Sales taxes on articles sold in interstate commerce, it is true, are held to be unconstitutional. Yet realizing the fact that the collection of local sales taxes in a given state may lead residents of that state to buy untaxed goods from other states instead of buying at home, the Supreme Court has upheld the constitutionality of collecting "use taxes" on the goods brought in from other states at the same rate as the local sales tax collected on goods purchased at home.[16] The use tax, which is levied not on all goods of the same kind used in the state but only those brought in from other states on which sales taxes are not paid, is obviously intended to prevent the local sales tax from driving local purchasers into the interstate market. In a sense, therefore, it constitutes a barrier to interstate commerce. The Supreme Court upholds it, however, recognizing that it is not a barrier to interstate commerce generally but only to that commerce which would be artificially stimulated by a particular kind of local taxation.

States whose major highways constitute interstate routes need to collect taxes from interstate commerce to pay for highway maintenance. Police laws must be enforced to protect the public and to protect the highways themselves against unnecessary injury. Many states forbid transportation of fruits and plants which might transmit diseases and insect pests into areas not yet affected. The Supreme Court recognizes the rights of states to enact such tax measures, regulatory measures, and police measures. Yet there is a tendency on the part of states to use such devices as a cover for giving special benefits to local citizens and local business. Some of them expand legitimate measures to make interstate commerce pay an excessive share of local taxes and to curb interstate commerce to the advantage of local business. While extreme abuses are likely to be held unconstitutional if challenged in federal courts, many measures of questionable validity are enforced by the states for want of such challenge.

The Federal Taxing Power. Although the Constitution gives power of taxation to the federal government, it neither specifically nor by implication denies that power to the states. They are forbidden, it is true, to levy duties on imports, but the prohibition does not extend to property or to activities completely within their jurisdiction. A major concern of federal and state officials is that both governments derive income from the same

15. *Brown* v. *Maryland*, 12 Wheaton 419 (1827).
16. Among the cases see *Nelson* v. *Sears Roebuck and Co.*, 312 U.S. 359 (1941). For discussion see Reynold E. Carlson, "Interstate Barrier Effects of the Use Tax," *Law and Contemporary Problems*, vol. VIII (Spring, 1941), pp. 223–33.

sources, which presumably are not inexhaustible. The higher the federal taxes on a given source the less the states can raise from the same source. As stated by the Hoover Commission,

> In order to provide funds for grants-in-aid, and to adjust to war and depression, the national system of taxation has been expanded until we have extensive overlapping and conflicts on the part of federal, state, and local governments. Of greater importance to state and local governments, the national need for revenue has caused the Congress in some instances to utilize productive tax sources that could be used just as effectively by state and local governments. In this manner, the circle widens. Under pressure to meet needs, Congress appropriates more for grants. In order to secure necessary revenues, the national tax base is expanded which makes it more difficult for state and local governments to secure their own revenue, and hence stimulates pressure from more and more groups for more and more grants.[17]

Since there is inevitable inefficiency in operating two tax systems on the same sources of revenue, and since some sources are likely to be excessively burdened, it has been suggested that all taxes should be raised by the federal government and part of the amount collected be turned over to the states for state purposes. Such a procedure, however, would prevent local manipulation of tax laws for local purposes, it would separate the people still further from local government, and it would raise extremely difficult questions about rightful standards of redistribution. It is not likely to be adopted until the need becomes greater than it now is.

Government Ownership of Property. Another important restriction on the exercise of state taxing power lies in the fact that the states may not tax federal property within their borders. The importance of the restriction varies from state to state. An instance is portrayed by an article in a Baltimore newspaper entitled "How Much of Maryland is Maryland?" with a sub-title, "Nearly 221 square miles belong to the Federal Government — which pays no taxes but carries on essential work and employs thousands." The article enumerated government holdings and called attention to the fact that the Edgewood Arsenal had an annual payroll of more than $10 million. The annual cost of a new naval medical center at Bethesda was estimated at $9,500,000 and that of the National Institute of Health at $37 million. The monthly operating cost of the Naval Academy at Annapolis is said to amount to $2 million. The value of the larger bases in Maryland was estimated at more than $445 million. The property is of course exempt from state taxation. A state tax official was quoted as protesting in the following language:

> A good many states have few or no government bases and they lose no taxes on that score. Here in Maryland we have big, important bases, the work of which benefits the whole nation. We have military, agricultural and medical centers. They are here because of the suitability of the terrain and nearness to Washington.

17. *Federal-State Relations,* House Doc. No. 140, 81st Cong., 1st sess., pp. 31–32.

> The point I want to make is this: It is not right that Maryland should be deprived of taxes when the work is being done for the benefit of the whole country. We feel that Congress should pay us something in lieu of taxes. In other words, let the other states chip in to make up some of our losses.[18]

Neither in Maryland nor in Virginia, however, nor in other states where the federal government is an extensive property-holder, has the government seen fit, as discussed in the preceding chapter with respect to the Tennessee Valley area, to reimburse the states for the withdrawal of property from local taxation. In some of these areas it is undoubtedly true, as of the Tennessee valley, that the presence of federal installations adds greatly to the total of taxable wealth in spite of the withdrawal of government-owned property from taxation.

Foreign Affairs. The conduct of foreign affairs is the exclusive province of the federal government, and the states have no right therein. Even so, in this as in other fields, there is overlapping between state and federal jurisdictions. The federal government, for example, has exclusive control over immigration and naturalization policies apart from such procedural matters as utilization of state courts for naturalization purposes; yet the presence of aliens in the United States and their conduct here is a matter of concern to the states. Prejudice against aliens of certain races has given rise to discrimination against them from time to time and to the use of state governments for discriminatory purposes. One illustration out of many was an Arizona statute which was called

> An act to protect the citizens of the United States in their employment against noncitizens of the United States, in Arizona, and to provide penalties and punishment for the violation thereof.

The statute required that any employer of more than five workers should employ not less than 80 percent qualified electors or native born citizens of the United States. The Supreme Court held that such discrimination against aliens lawfully resident in the state denied equal protection of the laws in violation of the Fourteenth Amendment.[19]

The limits of state jurisdiction over aliens follow a jagged line. In the absence of treaties to the contrary, a state may exclude aliens, and indeed all non-residents of the state, from the use of natural resources which belong to the state, including the right to hunt and to fish in the natural waters of the state. Yet it may not deny to resident aliens the right to fish in the ocean waters bordering the state if that right is given to its own citizens. The Supreme Court has upheld the power of a state to forbid aliens ineligible to citizenship to own land, saying that "The quality and allegiance of those who own, occupy, and use the farm lands within its borders are matters of highest importance, and affect the safety and power

18. Frank Henry, "How Much of Maryland is Maryland?" Baltimore *Sun*, November 14, 1948, Section A, page 1.
19. *Truax* v. *Raich*, 239 U.S. 33 (1915).

of the state itself."[20] The distinction between land ownership and participation in other activities in the state is a bit hard to maintain, however, as the non-agricultural aspects of our economic order become more important.[21]

Otherwise valid state regulations with respect to aliens may be invalidated by federal enactment of parallel legislation. For example, the Pennsylvania legislature enacted in 1939 an act requiring all aliens in the state to register once a year, to provide detailed information about themselves, and to carry identification cards. Before the Supreme Court had time to determine whether the Pennsylvania statute was rendered invalid by its drastic character, Congress enacted for the entire country a less drastic alien registration act. The Supreme Court was then called upon to appraise the state measure in the light of the federal enactment. Said the Court:

> When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute. . . . The federal government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. . . . Our system of government is such that the interest of the cities, counties, and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.[22]

The Court held that the registration of aliens was not a subject on which the states and the federal government had an equal and continuously existing concurrent power. Rather, whatever power the state had in this respect was subordinate to federal treaties and acts of Congress on the subject and could not be so exercised as to conflict or interfere with, curtail or complement operations under the federal law. In view of the existence of the federal statute, therefore, the state statute could not be enforced.

States and Federal Treaties. In many respects the jurisdiction ordinarily exercised by the states over local matters is curtailed by the federal power to make treaties. The definition of hunting seasons, for example, is ordinarily regarded as a local matter; yet in the important case involving interpretation of the treaty-making power, the Supreme Court held that the United States might enter into treaties by which it assumed responsibility for rules and regulations with respect to the killing of birds migrating from one country to another. Justice Holmes, speaking for the Court, noted a difference between the constitutional limitations applying to federal statutes and those applying to federal treaties.

Acts of Congress are the supreme law of the land only when made in

20. *Terrace* v. *Thompson,* 263 U.S. 197, 221 (1923).
21. For discussion of the several issues and citation of cases see *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410 (1948).
22. *Hines* v. *Davidowitz,* 312 U.S. 52, 62–63 (1941).

> pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way.[23]

Justice Holmes thought it undoubtedly true that, as between a state and its inhabitants, the state might regulate the killing and sale of migratory birds, but he thought it did not follow that the authority of the state was exclusive of the power of the federal government to make treaties with other countries over which the birds traveled in order to protect a food supply and to protect forests and crops against insect pests.

Federal treaties restrict state powers in various other situations. Treaties may require, for example, that aliens be given the right to own land, to take property by inheritance, to engage in various kinds of business, and to have access to local tribunals for protection of their rights.[24] On matters touched by federal treaties or by executive agreements, state policies must give way to the policies of the federal government. When, for example, the United States by recognition of the government of Soviet Russia approved steps taken by the Soviet government for the confiscation of deposits of a Russian corporation in a New York bank, the courts of New York were required to act in conformity with that policy in spite of the opposition of the state to the practice of confiscation. Said the Supreme Court:

> In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power.[25]

The Court said in another case dealing with the same subject:

> We repeat that there are limitations on the sovereignty of the states. No state can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the states; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the states become wholly irrelevant to judicial inquiry, when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.[26]

Other Federal Restrictions. In various other ways the federal government makes itself felt with respect to the exercise of state power. For ex-

23. *Missouri* v. *Holland,* 252 U.S. 416, 433 (1920).
24. For discussion see Nicholas P. Mitchell, *State Interests in American Treaties* (Richmond, Va.: Garrett and Massie, 1936).
25. *United States* v. *Belmont,* 301 U.S. 324, 331–32 (1937).
26. *United States* v. *Pink,* 315 U.S. 203, 233–34 (1943).

ample, although state institutions are not subject to federal taxation, the federal government may collect duties on the goods imported by a state. When a state becomes an importer, it enters the field of foreign commerce, over which the federal government has exclusive jurisdiction. The sovereignty of the state, therefore, gives it no immunity to such federal regulation.[27] In a very different field, action by the federal government has defeated state claims to ownership of bordering land extending from the low water mark three miles out to sea. Recent interest in such land developed with the discovery that much of it was underlain by rich oil deposits. Private corporations desiring access to the oil and believing that they could get more favorable treatment from states than from the federal government, urged states to defend their alleged rights. In 1947, however, in a suit brought by the federal government against the state of California to establish the claim of the federal government to such land, the Supreme Court held that the federal government had jurisdiction over the submerged land. The Court argued that protection and control of the three mile belt was a function of national external sovereignty. The very oil about which the state and nation were contending might well become the subject of international dispute and settlement. Furthermore,

> The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation. . . . The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks.[28]

While from behind the scenes the decision appears to be in part a decision against the big oil companies which sought to use the state governments for their own benefit, it was also a decision marking the continuing decline of status on the part of the states as the federal government becomes more and more involved in foreign affairs.

DIRECT PROHIBITIONS OF STATE ACTION

Original Restrictions. The Constitution includes certain specific restrictions on state action. The major portion of the original restrictions are those in three paragraphs of Article I, Section 10. They include measures which the states may not take under any circumstances, such as making treaties, coining money, and passing bills of attainder and *ex post facto*

27. See *University of Illinois* v. *United States,* 289 U.S. 48 (1933).

28. *United States* v. *California,* 332 U.S. 19, 35–36 (1947). Under pressure from petroleum interests, states having oil along their ocean borders continued to lobby for federal transfer of jurisdiction of the property to the states, with the political outcome still in doubt. See, for example, "A Communication," by Charles D. Drayton and the editorial answer thereto, *Washington Post,* May 24, 1948. For other cases see *United States* v. *Louisiana,* 70 S. Ct. 914 (1950) and *United States* v. *Texas,* 70 S. Ct. 918 (1950).

laws, and other measures such as collecting duties on exports and imports and making compacts with other states, which are prohibited except with the consent of Congress. The nature of most of the restrictions has long been well understood, and controversies concerning them rarely arise. The one which in the distant past caused most controversy is that forbidding any state to make any law impairing the obligation of contracts. It continues to be used on occasion, although after adoption of the Fourteenth Amendment in the post-Civil War period, the due process clause gradually took over much of this protective function with the result that the contract clause was used much less often than formerly.

Slavery and Involuntary Servitude. The first of the constitutional amendments to place restrictions upon the states was the Thirteenth, adopted in 1865, which forbade existence in the United States of either slavery or involuntary servitude except as a punishment for crimes. Its purpose was to outlaw slavery as it had existed in the South and to prevent its reestablishment. While no state has ever attempted to reestablish slavery as it originally existed, various state laws have violated the Thirteenth Amendment through sanctioning involuntary servitude by requirements as to forced labor. Such laws are usually denounced as peonage statutes. They usually deal with situations wherein Negroes who have borrowed money from white men are compelled to work for creditors to liquidate the debt. The facts and the atmosphere of many of the cases suggest that Negroes have been inveigled into borrowing in order to give their creditors control over their services. Peonage is outlawed by a federal statute based on the Thirteenth Amendment. On the basis of the amendment and the federal statute, the Supreme Court has held unconstitutional those state peonage laws which have been brought before it. A recent case of this kind involved a statute enacted by the Florida legislature. The statute was allegedly and perhaps genuinely drafted to punish fraud in securing loans under false pretenses. It made it a misdemeanor to secure advance wage payments on a contract to perform labor with the purpose of securing the payment without ever doing the work. The Supreme Court, discussing the case in the light of earlier peonage cases, held the measure unconstitutional even as applied to a man who had allegedly confessed that he had secured money in this fashion with intent to defraud. Said the Court:

> The defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affect not only the laborer under the system, but every other with whom his labor comes in competition. Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service. This congressional policy means that no state can make the quitting of work any compo-

nent of a crime, or make criminal sanctions available for holding unwilling persons to labor.[29]

Due Process Restrictions. The due process clause of the Fourteenth Amendment performs two related functions. First it restricts state governmental procedures, and particularly judicial procedures, to those which have been traditionally regarded as "due process." Second, it guarantees what has come to be known as "substantive due process," by way of judicial decisions which hold that there are some things which cannot be done by government whatever the procedures employed. Procedural due process requires, among other things, that a person taken into custody shall be given a hearing before he is condemned, shall have a right to be confronted by the witnesses against him, shall be protected and aided in the presentation of his defense either by counsel or otherwise, and shall be free from coercion as to the testimony which he gives. The federal Supreme Court performs an important function in seeing that the standards of due process are maintained in the states. The areas in which restraint has been most needed in recent years have been those where impecunious and usually poorly educated defendants have been denied adequate assistance in the conduct of their cases, either by counsel or by the court itself, and those in which confessions have been extorted by "third degree" methods and then used to secure convictions. Although the failure of trial courts to provide defendants with counsel does not always constitute a denial of due process of law if in some way the court itself sees that the rights of defendants are protected, some kind of protection is assured even though members of the Supreme Court in recent years have divided sharply over the extent of the protection which must be given.

The position of the Supreme Court on convictions secured by forced confessions has been stated as follows:

> Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility rests upon this Court than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution — of whatever race, creed or persuasion.[30]

While by no means all police brutality is eliminated by enforcement of the due process restriction, enforcement does have some effect in maintaining tolerable standards of performance in the states.

Substantive Due Process. By what is called substantive due process as distinguished from procedural due process the Fourteenth Amendment,

29. *Pollock* v. *Williams*, 324 U.S. 4, 18 (1944).
30. *Chambers* v. *Florida*, 309 U.S. 227, 241 (1940).

particularly from the 1880's until the 1930's, was used extensively to defeat state legislation which the judiciary believed to be fundamentally bad because it violated either property rights or personal rights. With respect to property, the Supreme Court enunciated the principle that, in order to be constitutional, state regulation of public utility rates must not deny the opportunity to earn a fair return on the fair value of the property involved. This holding resulted in an enormous amount of litigation during the first third of the twentieth century and frustrated a great deal of state legislation for the regulation of public utilities. Believing that the welfare of the country required the maximum amount of freedom for businessmen and business corporations, the judiciary restricted the activities of state governments to insure that freedom. The right of the states to regulate hours and wages and working conditions of labor had likewise to undergo judicial scrutiny in terms of the prevailing conception of due process. The Supreme Court may well have overdone the exercise of its restrictive power. A disapproving point of view was once expressed by Justice Holmes in the following language:

> There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.[31]

It was only with the coming of the New Deal, and the culmination of broad changes in the attitudes of people toward rights of property in relation to other rights, that the use of substantive due process was drastically restricted in the appraisal of state legislation.

Due Process and Personal Rights. Currently more important than substantive due process restrictions on state interference with property rights is interference with restrictions on personal or civil rights. It will be recalled that the First Amendment, which guarantees freedom of speech, the press, religion, and assembly, applies only to the federal government and not to the states. The Supreme Court has held, however, that the provision of the Fourteenth Amendment which forbids states to take life, liberty, or property without due process of law precludes state invasion of the freedoms protected in the First Amendment against federal action. So it is that a state may not deny freedom of speech or press or religion or assembly. So it is that the due process prohibition prevents a state from interfering with labor picketing which is not infused with force and violence, since picketing is subject to justification as an exercise of freedom of speech. So also, a state may not forbid labor organizers to solicit union membership without securing organizer's cards. A state may not interfere with freedom of religion by compelling school attendance and at the same time requiring those who attend to salute the American flag when doing

31. *Truax* v. *Corrigan,* 257 U.S. 312, 344 (1921).

so violates the tenets of their religion.[32] The Supreme Court acts, of course, only when cases arising under offending state statutes are brought before it. There are undoubtedly many violations of due process which never get into the courts at all or which, if they get into the state courts, are never appealed to the Supreme Court for rectification. In the forbidden fields, however, the Constitution erects a broad barrier against the exercise of state powers; and the Supreme Court, when appealed to, interprets and applies the Constitution in such a way as to check the forbidden activities.

Equal Protection of the Laws. States are also restrained by the provision of the Fourteenth Amendment that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This does not mean that states may not classify subject matter into groups for different treatment. They may tax incomes of a given level at one rate and higher and lower incomes at other rates. They may tax inheritances by relatives at one rate and inheritances by non-relatives at a different rate. They may not discriminate among individuals without a reasonable basis of classification, however, and in particular they may not use race as a basis of discrimination. The equal protection clause has, for example, the effect of forbidding state courts to enforce restrictive covenant agreements by which designated racial groups are kept out of particular neighborhoods. The Supreme Court has said that

> The Constitution confers upon no individual the right to demand action by the state which results in the denial of equal protection of the laws.[33]

Although it may be that a state can constitutionally segregate races for educational purposes, it can do so only if it provides equality of facilities, and the equality must be real and not merely nominal. Controversies over this issue continue to rage in the southern states where the cultural gap between white and colored races is widest and where state governments resist in every feasible way the import of the equal protection clause.[34] While neither this clause nor any other in the Constitution attempts to coerce all states into dull uniformity of behavior, it does attempt to insure minimum standards in the exercise of the governing powers of the states.

SUPERVISION OF RELATIONS AMONG THE STATES

Reciprocal Privileges of Citizenship. Article IV, Section 2, of the Constitution provides that "citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." The clause was intended to guarantee an equality of right which might easily have been denied by states jealous of their local ways and local privileges. It did much to break down state barriers for American citizens in every state,

32. See *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).
33. *Shelly* v. *Kraemer*, 334 U.S. 1, 22 (1948).
34. For recent Supreme Court decisions in this field see *McLaurin* v. *Oklahoma State Regents*, 70 S. Ct. 851 (1950), and *Sweatt* v. *Painter*, 70 S. Ct. 848 (1950).

no matter which the state of original citizenship. Any citizen of one state has in every other state the same rights to hold property, engage in business, practice professions, and enjoy liberties possessed by citizens of the state into which he goes. This principle is well established. Such difficulties as have arisen have usually been concerned with the rights of a corporation of one state to do business in another. A corporation is an artificial person, and it does not possess directly the rights of citizenship. A corporation of one state, as distinguished from a citizen, is not guaranteed the right of doing local business in another state. It secures such a right only by the permission given specifically or by general law of the state into which it goes.

Full Faith and Credit. Article IV, Section 1, provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." This provision breaks down other barriers between the states. It means among other things that in every state in the Union rights are preserved which have been derived from the statutes, ordinances, records of deeds, wills, births, marriages, contracts, and the decisions and orders of the courts of any state.

In most fields, the requirements of the full faith and credit clause are now observed as a matter of course. Difficulties arise for the most part in matters on which state policies greatly differ. The most important state controversy is over marriage and divorce. Until recently state practice on divorce has varied all the way from that of one state which granted no divorces at all to that of certain other states which granted divorces on the loosest possible grounds after six weeks of nominal residence. States which grant divorces only under exceptional circumstances and after long periods of time resent arrangements by which their citizens may spend a six weeks' vacation in Reno, claim residence there, secure divorces in Nevada courts, and return married to other persons or to remarry after reestablishing themselves in their former homes. There is something offensive about having to give "full faith and credit" to such Nevada proceedings in the absence of "full faith" in establishing Nevada residence for the briefest possible period merely to avoid the restrictions of the laws of the native state. The practice is highly disturbing to the differing moral codes of different communities. Furthermore, if some states refuse to recognize the validity of divorces and remarriages which are valid in other states, titles to property and lines of inheritance are dangerously confused.

The issues involved in divorces obtained in states which make a lucrative business of granting easy divorces are amazingly tangled. The Supreme Court has handed down a number of decisions on the subject in recent years without much clarification of the issues. One result has been to demonstrate the doubtful validity of divorces received by applicants only actually visiting in the divorce-granting states for six weeks' periods and then returning to their initial places of residence. In a decision handed

down in 1945, for example, the Supreme Court found the facts to be as follows:

> Petitioners, long-time residents of North Carolina, came to Nevada, where they stayed in an auto-court for transients, filed suits for divorce as soon as the Nevada law permitted, married one another as soon as the divorces were obtained, and promptly returned to North Carolina to live.[35]

North Carolina refused to recognize the newly established marital status and brought the newly married couple to trial for "bigamous cohabitation." The court in which they were tried denied that they had become bona fide residents of Nevada and took the position that, since they were not residents of Nevada, that state had no power to grant their divorces. The Supreme Court held that under the circumstances the North Carolina court was within its rights in refusing to recognize the validity of the divorces and the new marriage and in punishing the two people for living together as man and wife without being legally married.

In view of the difficulty, or in some instances the impossibility, of finding out to what marriages and divorce decrees the states are obligated to give full faith and credit, it is frequently urged that uniform marriage and divorce laws should be enacted. Unfortunately, Congress apparently has no jurisdiction to enact a federal law on the subject. As for uniform laws drafted and adopted by the legislatures of the several states, sentiments differ so greatly from locality to locality that agreement among the states seems most unlikely. In particular, Nevada and other states which now cater to divorce business by easy divorce laws are not eager to destroy that business by agreeing to uniform legislation.

THE CHANGED CHARACTER OF STATEHOOD

The total impact of the federal government on the states is so great as to invite a reexamination of statehood as it now exists. A state in the traditional sense is an independent body politic. It has foreign as well as domestic relations, and it does as it pleases except as discretion bids it trim its external behavior in the light of what other states may do. It has no immunity to external attack and no claim on the benevolence of other states except as alliances may be formed to meet common needs.

The states of our federal Union have drifted a long way from this standard. Only fourteen of the contiguous states — the original thirteen states and Texas — have ever been completely independent;[36] and there is doubt whether the original thirteen were ever individually independent in their foreign relations. All the states have long been subject to the outright prohibitions of the Constitution and to the restrictions resulting from the operations of the federal government within their borders. All of them

35. *Williams* v. *North Carolina*, 225 U.S. 226, 236 (1945).
36. Hawaii, however, had a long period of independence before it was annexed to the United States.

benefit from the expenditure of federal funds within their borders and for the good of their people, and submit to a measure of regimentation in connection with the administration of federal grants. The welfare of their people as far as foreign relations are concerned is supervised not by the states but by the federal government. They cannot make treaties with foreign states or wage war independently — except in resistance to attack — or make compacts with other states of the Union except with the consent of Congress. They cannot maintain tariff barriers against other states or exclude their residents from business opportunities. They cannot even deny state citizenship to the citizens of other states who choose to take up residence within their borders. In short, although they are states of the Union as we choose to use the term, they are far from statehood in the international sense.

Since independence, or sovereignty, is a basic characteristic of a state in the international sense, the lack of it in the members of our Union has neutralized them in important respects. They lack the drive toward internal unity and patriotism which comes with the power and the necessity of fully looking after their own affairs. Symbols of unity and political personality lose much of their importance. Whereas there are few Americans who do not recognize the Stars and Stripes as the flag of their country, the percentage of the people who could identify the several state flags is probably very small.

The low position of statehood in the United States does not mean that the federal government has made war on the states and wrested from them powers which they ought to exercise. It does not mean that there has been a decline in the total activity of the state governments. Rather, it means that with the changing character of our economic system and the change in our international position our activities in an ever-widening field become matters of concern to the federal government. The states as well as the federal government have expanded their functions, but the federal government has expanded so much faster as to leave the states far behind in comparison. The states continue to do a flourishing business in supervising local affairs — affairs which are not national or regional in scope. The federal government is not concerned with curtailing this business. The difficulty is that affairs once regarded as local so rapidly take on connotations of national importance that the expanding performance of the federal government often gives the impression of illegitimate invasion of the sphere of the states. Perhaps because of their lack of external responsibilities and their hope that expensive local functions can be performed by the federal government with less cost to themselves, the states often lack the unity and drive which would bring about high grade performance within their rightful spheres. Northern and southern Illinois are not unified by the necessity of taking a stand against Indiana. Another state plans the construction of major highways only as it can get financial aid from the federal government. The character of a local school system will be shaded according to the program of federal aid. A war against local crime gets

under way only as the federal government provides incentive and assistance. This dependence on government at a distance probably takes something from the quality of local citizenship and to that extent is to be deplored. Nevertheless the change marks also a transition to greater national unity, toward achieving a greater oneness of the American people. It remains to be seen whether we can achieve oneness without loss of desirable qualities of uniqueness and individuality.

References

George C. S. Benson, *The New Centralization* (Farrar & Rinehart, 1941).
Henry J. Bittermann, *State and Federal Grants-In-Aid* (Mentzer, Bush, 1938).
The Book of the States, 1948–49 (The Council of State Governments, 1948).
John A. Burdine, *National-State Cooperation, with Special Reference to Texas* (Southern Methodist University, 1935).
Federal Grants-In-Aid; Report of the Committee on Federal Grants-in-Aid (Council of State Governments, 1950).
Emerson D. Fite, *Government by Cooperation* (Macmillan, 1932).
John M. Gaus and Leon O. Wolcott, *Public Administration and the United States Department of Agriculture* (Public Administration Service, 1940).
William Brooke Graves, *American State Government* (Heath, 3d. ed., 1946).
———, *Uniform State Action, a Possible Substitute for Centralization* (University of Pennsylvania, 1936).
V. O. Key, Jr., *The Administration of Federal Grants to States* (Public Administration Service, 1937).
Austin F. MacDonald, *Federal Aid; A Study of the American Subsidy System* (Crowell, 1948).
Bennett M. Rich, *The Presidents and Civil Disorder* (Brookings, 1941).
J. Kerwin Williams, *Grants-In-Aid under the Public Works Administration* (Columbia University Press, 1939).

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The Nation and the Cities

In theory the American Union is a union only of states. It takes no account of cities, towns, villages, counties, and other units of local government. Local governments have no claim to sovereignty, to exemption from control by some higher authority. In a strictly legal sense they are nothing more than arms of the states. A strictly legal approach, however, leaves important facts of governmental organization and operation unexplained. To refer to Chicago as but an arm of Illinois or to New York City as but an arm of New York is as unrevealing as to call the General Motors Corporation an instrument of Delaware or the Southern Pacific Company an instrument of Kentucky, under whose laws it is organized. The major cities of the country and some local governments hardly to be listed as major have enough significance in themselves to require direct attention from the federal government. Cities man our ports for foreign trade, they are centers of internal exchange, they are centers of manufacture. They house and provide employment for a major portion of our population. Upon their well-being depends in no small part the well-being of the nation.

Although the constitutional powers of cities and other local governments are derived from state constitutions, even when as in some instances they have what is called "home rule," most of them occupy somewhat difficult positions in their respective states. Most state constitutional patterns were established when urban percentages of total population were much smaller than they now are, and urban representation in state legislatures has remained low in spite of the phenomenal expansion of cities. In 1950, for example, Atlanta, with 10 percent of the population of the state of Georgia, had only 4 members in a legislature of 259. Chicago, with more than half the population of Illinois, had 57 out of 153 members of one legislative house and 19 out of 51 in the other. Baltimore, with more than half the population of Maryland, had 36 members out of 120 in one house and 6 out of 29 in the other. Similar ratios were found in many other states.[1]

1. See materials presented by Senator Paul Douglas, *Congressional Record* (temporary daily edition), June 12, 1950, p. 8455.

This meant that cities were subject to possible discrimination in matters calling for state control and involving conflicts of interest between urban and rural areas.

Other difficulties in the way of sound state supervision lie in the fact that the metropolitan areas of a number of major cities extended into two or more states. That of New York City reaches far into New Jersey and Connecticut as well as New York. The Chicago area has built into Indiana and has an impact on life in Michigan and Wisconsin as well. St. Louis crosses the Mississippi from Missouri into Illinois. Kansas City overlaps Kansas and Missouri. Other urban areas cross state lines in similar fashion, so that one state acting alone would be unable to supervise the whole area however seriously it attempted to do so. Another fact has practical importance. Most cities are surrounded by suburban areas which make up part of their urban life but over which they have no control. The division of control prevents efficiency in police matters, taxation, and community services. While it would be theoretically possible for the states to redefine urban areas from time to time to include their suburbs in the same state, or to permit cities themselves to reach out to incorporate adjacent urban areas, few states have taken such action. Control, therefore, is inadequate and inefficient.[2]

Another fact is important. It is often the federal government, and not the state or states in which an urban area is located, that controls the commerce of the area and therefore determines the conditions of its living. To the extent of this federal control over business, neither the cities nor the states in which they are located can take responsibility for urban welfare. For these varied reasons we see the federal government taking more and more responsibility for the problems of urban areas. The discussion of national-urban relations, however, begins logically with the district of Columbia, where the federal government has full jurisdiction and responsibility.

THE DISTRICT OF COLUMBIA

Area and Functions. Like many other urban areas, that of the District of Columbia overlaps state lines. With its core in the District proper, it extends well into both Maryland and Virginia. It is not industrial. The suburbs extending into the adjoining states consist primarily of government workers and the people who supply them with services and the necessities of life. Yet one of the overlapping areas is governed by Maryland and constitutes in effect the third largest city in that state,[3] while the other such area is governed by Virginia.

The original tract of the District of Columbia, ten miles square, was carved out of the two states of Maryland and Virginia to provide a seat of

2. See William Laas, "'The Suburbs are Strangling the City,'" *New York Times Magazine*, June 18, 1950.
3. See Frank Henry, "Washington, Maryland," Baltimore *Sun*, July 17, 1949.

government which would not be subject to the jurisdiction of any state. The early government buildings were all erected on the Maryland side of the Potomac, and in 1846 Congress ceded back to Virginia the portion of the District lying in that state. With the growth of the country, however, came expansion of the federal government and of the city of Washington and the other urban communities in and adjacent to the District. Government workers began to move into the adjacent states, and were followed by government agencies themselves. The gigantic Pentagon Building, the headquarters of the Department of Defense, was erected on the Virginia side of the Potomac during World War II.

As far as government buildings are concerned, the federal government exercises full jurisdiction over them even when they are located within one of the states. Government employees who reside within the states, however, are subject to state laws, including police and tax measures. They could, and some of them do, become citizens and voters of the states in which they reside. Most of them, however, prefer to be included in the Civil Service quotas of the states from which they came and therefore maintain voting residence at distant points throughout the Union. So it is that a native of Nebraska may have his voting residence in Lincoln, occupy a house or apartment in Alexandria, Virginia, and work in the District of Columbia.

Government of the District. Within the District itself, covering some seventy square miles, has grown up a highly populous commercial and residential community around the governmental establishment. While large numbers of workers are employed by the government, there is a considerable population which serves the government indirectly by providing transportation, food, and other necessities but does not work directly for it. Other people provide amusement facilities, others make up substantial lobbyist populations, and still others live in the vicinity for political and social reasons.

These residents, however, have no direct political control over local government such as that exercised by people residing in other cities throughout the country. In terms of the Constitution, the District is governed by Congress and not by the local residents. It exists not as an independent political community but as a seat of government. During its first approximately three-quarters of a century, it is true, some local voting privileges were given, but since 1874, because of difficulties of local government in an area in which the prime activity is the functioning of the federal government itself, no such privileges have been given. The Congress of the United States is also the legislature of the District of Columbia. Statutes concerning District matters are enacted by Congress in the same way as other statutes. Problems of District government fall to the respective committees of the two houses which have jurisdiction over the District. On the members of those committees the burden is heavy. Most members of the House and Senate who are not members of the District committees

give little attention to District legislation. Even so, by voting or refraining from voting they influence the course of legislation whether or not they are equipped for intelligent action.

The congressional burden is lightened, it is true, by local administrative machinery and a system of federal courts in the District which correspond to the federal judicial system in the states, with a purely local judicial structure at its base. The administrative structure is headed by three commissioners, two of whom are appointed for three year terms by the President with Senate confirmation while the third is detailed by the President from the Corps of Engineers of the United States Army. The commissioners, in addition to other administrative functions, make recommendations for the enactment of legislation for the District, including programs of taxation and expenditure. The federal government itself, in lieu of what might otherwise be its position as taxpayer for support of the government of the District, makes an annual contribution of $12 million. The remainder of the budget, which totals somewhere in the vicinity of $100 million, calls for local taxation.

Proposals for Change. It may be that the government of the District works as well as could be expected, given the overlapping of district and state areas, the shifting character of the population, and other considerations. There are, however, many grounds for discontent. Although its budget of $100 million is approximately twice the amount of the budget for the entire federal government a hundred years ago, District taxes are levied without local representation, and taxation without representation is hardly less unpopular now than it was at the time of the Declaration of Independence. The commissioners are not well known to the residents of the city and feel no such obligation as would be felt by members of a city council to consider the desires of the people. The subordinate organization of the local government, which has grown up piecemeal, badly needs revision. Slum areas have been permitted to develop which would be a disgrace to any commercial city, let alone the national capital. Local newspaper items refer to mismanagement of local hospitals, misuse of funds and personnel for the fire department, and gross violations of civil rights by the local police.[4] Crimes of personal violence are rampant.[5]

While such conditions exist in other cities which elect their local governments and while it is not assumed that the forms of democracy would cure all ills, committees in both houses of the Eightieth Congress gave serious consideration to a measure providing for home rule by a city manager who would be chosen by a council of twelve men which, in turn, would be elected by the residents of the District. Final action was prevented by opposition based on various grounds. Some people opposed the particular plan of government, some thought that the capital city should

4. For Supreme Court comment on one of the less gross examples of misconduct see *McDonald* v. *United States,* 335 U.S. 451 (1948).
5. See Howard Whitman, "Terror in Washington," *Collier's,* June 24, 1950.

continue to be governed by Congress, and some disliked the manner and scope of the allocation of suffrage. Among other things, government employees who had resided in the District for a year were to be permitted to vote in local elections even though they maintained a voting residence in the states from which they came, thereby maintaining a kind of dual suffrage scheme. This arrangement was advocated on the ground that tax-paying government employees were entitled to participate in local government even though for political purposes they maintained residence elsewhere and that, indeed, good government in the District required the participation of these people. Others saw in this scheme a device to dilute the voting strength of the very large permanent group of Negroes in the city who have no political connections in any state. Another home rule measure passed the Senate during the Eighty-first Congress but was held up in the House of Representatives, evidently in part because of the difficulty of coping with race problems in the District. It seems likely, however, that some such measure will eventually be enacted.

THE FEDERAL INFLUENCE OVER CITIES

If Congress is too busy or too inept or improperly constituted to provide an efficient government for the District of Columbia over which it has full jurisdiction, it would seem that not too much should be expected from its handling of the problems of other urban areas. Yet the situation is not the same. Congress does not attempt to prescribe the local governments of Philadelphia, New Orleans, Omaha, San Francisco, or Seattle. It concerns itself rather with matters for which the Constitution makes it responsible, such as the regulation of interstate and foreign commerce, taxation, national defense, operation of the governmental establishment generally, and promotion of the public welfare. All this it does without direct interference with local control of local government. Yet national and local matters so intertwine that in the process of exercising its legitimate powers the federal government wields tremendous influence in some municipalities.

The Local Effect of Control of Foreign Commerce. The federal government does much to condition life within the port cities of the country through its control over foreign commerce and immigration. President Thomas Jefferson made himself intensely unpopular in the port cities, particularly of New England, through the embargo and non-intercourse measures sponsored by him which destroyed trans-oceanic trade and along with it the prosperity of the cities in question. Later these cities and the mercantile interests therein bitterly denounced "Mr. Madison's war" and were largely responsible for the hostility toward the federal government expressed in the Hartford Convention of 1814. Tariff measures which greatly curtail importation may seriously injure port cities unless local industry can be built up to compensate for the losses. In any event, the balance of federal regulations of foreign trade has a great deal to do with

the character and kind of prosperity enjoyed in the port cities. Federal inspection and federal efforts to prevent smuggling and other offenses become a part of the behavior of the local community and influence general behavior in many different ways.

The control of commerce in people as well as in goods greatly influences the character and behavior of port cities. Free and unrestricted immigration long ago resulted in establishment of Chinatowns, Little Italys, and urban districts made up of Irish, Spanish, Poles, and various other nationalities who brought along and preserved their native cultures and languages within American cities. Federal restriction of immigration, on the other hand, tends somewhat to retard the expansion of such areas and the establishment of new ones. Such legislation, at the same time, affects the local labor supply and along with it the health measures, the police measures, and various other types of measures which cities must enact for their own government and protection.

Control of Interstate Commerce. Federal control of interstate commerce operates likewise upon all the cities of the country. Federal regulation of transportation by railroad, by ships on oceans, lakes, bays and rivers, by airplanes, and by busses and trucks does much to condition life in cities which were established because of the commercial advantages of particular locations. Railroad builders in earlier years demonstrated their ability to turn a given village into a thriving metropolis or to decree its virtual extinction by the plotting of railroad lines. Federal regulation of rates, while operating much less drastically, has long range effects in determining the routes over which commerce will flow and the quantity of commerce in given products that will flow at all. In justifying regulation of the meat packing industry in Chicago, the Supreme Court once characterized Chicago as a "throat of commerce" through which passed livestock from western farms on the way to consumer tables in homes throughout the United States and in foreign countries.[6] In various other ways, if in less picturesque fashion, urban activities are regulated by the federal government on the basis of their relations to interstate commerce and to the welfare of the country as a whole. Examples are provided by the regulation of labor relations, not only on railroads and other instruments of interstate commerce but also in the industries which produce for interstate commerce.

The Influence of Government Purchases. In its capacity as a purchaser or consumer, the federal government has long conditioned the lives of communities in which its major purchases were made. It has had a great deal to do with the areas where naval construction and repairs take place. Its needs for military supplies have kept factories humming in interior cities. During the period of major construction in the Tennessee Valley, the federal government not only established new towns but sponsored enterprise which virtually made over the activities of older communities. By

6. *Swift and Company* v. *United States,* 196 U.S. 375 (1905).

virtue of its needs during World War II, it worked tremendous dislocation in many urban centers. Thousands of workers from other urban centers and from rural life were drawn to aircraft factories and munitions factories of various kinds. New homes had to be built either under public or private supervision. Streets, sewers and other public utilities had to be extended, marketing areas and schools had to be provided, and supervision had to be established over new urban areas which a few months earlier may have been virtually open country. The new population and the new areas of activity created tremendous strains on the established mechanisms of urban life. Such changes brought about to meet emergency needs of the federal government may bring permanent transformations of urban centers or leave them with "ghost towns" or slum areas in their suburbs. Some influence of this kind is virtually continuous. Within the foreseeable future, the federal government is likely to continue to spend billions of dollars annually on national defense with consequent influence upon industrial production and upon life in cities in predominantly industrial areas.

Federal Offices and Personnel. The federal government exerts important though indirect influence upon local government by virtue of the fact that federal offices and federal employees are located throughout the country in places where they come in constant contact with the employees of local governments. In rural areas, county officers and the officers of irrigation districts and other special districts are in relatively continuous association with federal officers connected with the Forest Service, the Soil Conservation Service, the Bureau of Reclamation, the Corps of Engineers, the Federal Power Commission, and various other agencies. Whether or not they have any such intention, federal officers tend to act as missionaries for federal policies and federal standards. During the early years such influence was exerted only through such limited agencies as the federal courts, the federal post offices, and federal tax collectors. Now the more numerous agencies bring local infiltration of federal policies of innumerable kinds. The telephone directory for the city of Baltimore contains nearly four columns of fine print listings under the heading "U.S. Government Departments." Major agencies listing branches include the three military departments and the executive Departments of Agriculture, Commerce, Justice, Labor, Post Office, and Treasury; and the Federal Communications Commission, the Federal Mediation and Conciliation Service, the Federal Security Agency, the General Services Administration, the Federal Bureau of Investigation, the Interstate Commerce Commission, the Office of the Housing Expediter, the Selective Service System, and the Veterans Administration. Telephone directories in other major cities have similar listings, and astonishing numbers of such listings are included even in smaller communities. Associations between federal and local officers inevitably have a gradual impact upon local policy generally, upon local methods of administration, and upon personnel standards and salaries and other matters. The federal influence tends toward unification and standardization. Its impact

may be said to be in some respects similar to that of giant chain store organizations which come into a community and by the establishment of uniform patterns exert a gradual influence upon local competitors. Whether this influence is for better or for worse may vary from situation to situation. In general, the field agencies of the federal government make local officers increasingly aware of the regional and national implications of local policy and impart new and often significant ideas concerning methods of administration and promotion of the public welfare. Sometimes, it is true, they merely exasperate local officials by attitudes of superiority and lack of awareness of the unique local aspects of general problems.

DIRECT FEDERAL AID

Historical Background. Municipalities, like states, receive grants-in-aid from the federal government. The pattern of federal grants-in-aid was established in connection with grants to the states. Until the beginning of the New Deal period most federal grants which reached the areas of local government were made not to the local governments themselves but to the states. In certain fields, as in highway construction, there had been a tendency to assume that cities could take care of themselves more adequately than rural areas and therefore to exclude urban areas from federal donations. With the beginning of the New Deal period, however, the pattern was changed. The immediate aim was wholesale spending to reverse the downward trend of the business cycle and to bring emergency relief to areas of greatest distress. Although economic distress was general, the relief burden of the cities was peculiarly heavy. Instead of attempting to operate round about through the state governments, the federal government attacked the evil directly by planning expenditures at the points where relief was needed. During the three years beginning July 1, 1933, the federal government expended some $9 billion on relief and on work undertaken largely for relief purposes. Of the total it is estimated that nearly $6,800,000,000 "either substituted for expenditure from local government treasuries or directly affected functions normally paid for locally."[7] Much of the money expended, it is true, passed through the treasuries of neither the states nor the local governments. However, by making the expenditures the federal government took the task of relief out of the hands of over-burdened localities and assumed responsibilities which in normal times would have been undertaken by local governments. It made money available for paving roads and streets and for building or renovating school houses, city halls, jails, sewage systems, public lavatories, and other establishments; and in various other ways it restored the hum of business activities in depressed communities. It put additional money into circulation by clearing slums and constructing federal housing projects. It reestablished community stability by making loans to prevent foreclosure on private

7. Wylie Kilpatrick, "Federal Relations to Urban Governments," in National Resources Committee, *Urban Government* (Government Printing Office, 1939), p. 105.

homes and by guaranteeing private loans on dwellings which measured up to prescribed standards.

Since the goal of the federal government was first of all to provide relief for distress and to promote economic recovery, projects were undertaken from a very different point of view than that of a local community making its own expenditures in terms of its permanent standards and long-range desires. A community may, it is true, have gotten repairs for its courthouse, city hall, jail, or streets which were absolutely necessary and which, in the absence of federal funds, would have had to be provided locally by one means or another. But it may also have gotten a new school building for which, rather than make its own expenditures even in time of prosperity, it might have waited another ten years; or a public monument or park which if left to its own initiative and its own expenditures it would never have had at all. Federal appropriations, in other words, in order to achieve relief and recovery, produced a lavish expenditure to which many communities hitherto paying their own way had not been accustomed. So it was that in fulfilling its own purposes the federal government modified what might be called "the public living standard" of many communities and incidentally no doubt made it harder thereafter for them to live within their traditional means. Because of the benefits of federal financial aid, however, many cities substantially reduced their indebtedness and improved their financial positions generally. They had hopes of preserving their higher standard of living if the federal government could be persuaded to maintain a substantial flow of federal funds for local projects.

Current Federal Financial Aid. After the economic dislocation brought about by World War II, the federal government continued municipal grants-in-aid for many purposes. Because of conflicting local sentiments about federal control of local affairs and about the relations of business and government generally, such grants and the conditions attached to them always provoked controversy. The subject of housing, which was discussed generally in an earlier chapter, provides illustrations. Suspension of the construction of private dwellings during the war except for emergency housing of war workers resulted in a tremendous demand for new houses after the war. It was clear that many millions of homes would have to be constructed promptly and at relatively low prices if housing was to be provided and if abandonment of federal rent control was to be made possible. In various forms the federal government subsidized construction, in the face of rising costs and in the face of opposition from the private housing industry. Municipal governments, some of which did and some of which did not receive aid from their state governments, were unable to go far toward meeting the housing demands. Furthermore, they operated between the conflicting pressures of citizens demanding speedy construction of low-cost housing and housing lobbies which demanded that construction be left largely to private enterprise. The infrequency with which mayors ap-

peared before congressional committees in support of federal grants-in-aid for housing suggests the local power of private housing interests. On the other hand, the mayors of the larger cities, as united in the United States Conference of Mayors, stood firmly together in support of broad programs of federal aid for housing construction.[8] Many governors and mayors when individually consulted gave vigorous support to federal aid programs.[9] When the competition of federal aid programs antagonizes local pressure groups, such groups sometimes voice their hostility through state legislatures as, for example, in the following declaration of independence by the General Assembly of Indiana:

> Indiana needs no guardian and intends to have none. We Hoosiers — like people of our sister states — were fooled for quite a spell with the magicians' tricks that a dollar taxed out of our pockets and sent to Washington will be bigger when it comes back to us. We have taken a good look at said dollar. We find that it lost weight in its journey to Washington and back. The political brokerage of the bureaucrats has been deducted.
>
> We have decided that there is no such thing as "federal" aid. We know that there is no wealth to tax that is not already within the boundaries of the forty-eight states.
>
> So we propose henceforward to tax ourselves and take care of ourselves. We are fed up with subsidies, doles, and paternalism. We are no one's step child. We have grown up. We serve notice that we will resist Washington D.C., adopting us.[10]

The picture in Indiana is seen from a different angle, in a letter submitted to the Joint Congressional Committee on Housing by the mayor of the city of Gary. Mayor Finnerty declared that the financial plight of American cities made it impossible for them to house low income groups in view of the wide gap between current rentals and the families' ability to pay. He urged continuation and expansion of federal aid, saying that

> I am forced to tell you frankly that until our legislature provides us with new sources of taxation, Gary and other Indiana cities will not be in position to finance any of these costs. There is, at the present time, a provisional statute for a tax levy to be used in razing condemned buildings. The amount provided is not sufficient to carry on any general program of area redevelopment. . . . The legislature did in 1945 adopt a plan for the city of Indianapolis. This urban redevelopment program was limited to cities of first class and is not available to other cities. Its fault, if any, lies in the fact that no provision was made to insure that low income families living in such areas will be provided with decent housing at prices they can afford to pay.[11]

8. See, for example, *Housing,* Hearings, Senate Committee on Banking and Currency, 80th Cong., 1st sess., pp. 222–38, and *New York Times,* February 18, 1949 and Baltimore *Evening Sun,* February 17, 1949.
9. See for example *General Housing,* Hearings, House Committee on Banking and Currency, 80th Cong., 2d. sess., pp. 56–104.
10. *Housing, op. cit.* above, note 8, p. 569.
11. J. E. Finnerty, Mayor of Gary, Indiana, quoted *General Housing, op. cit.* above, note 9, pp. 77–78.

In spite of the opposition which restricted action of the Eightieth Congress to what President Truman called a "teeny weeny" housing bill, and which eliminated middle-income housing from the measure enacted by the Eighty-first Congress and kept emphasis on private construction with local funds rather than federal construction, federal aid for housing seems likely to be continued for a considerable period or perhaps indefinitely.

Federal aid continues likewise in other important fields. Now that the practice has been well established of giving aid for street paving as well as for the pavement of rural highways, cities still receive considerable sums for that purpose. An important development of recent years has been the construction of municipal airports with substantial amounts of federal aid. In encouraging the construction of airports as in encouraging the construction of private dwellings, the federal government modifies the pattern of urban behavior and also the activities of municipal governments. Federal aid to local education continues in various forms and seems likely to expand rather than contract. Here again, the pattern of local living submits to modification as the offer of federal funds induces communities to make expenditures which they might otherwise not make and as the federal government prescribes the conditions that must be met if grants are to be made. So it is that local peculiarities which are inconsistent with federal standards are gradually ironed out of community behavior as part of the process of federal financing of local activities. Public health programs likewise have their impact. If they are expanded to include a program of medical and hospital services for all the people, the impact of federal influence upon community life will be substantially increased.

Non-Financial Aid. The federal government gives aid to local governments in various ways which, while obviously calling for federal outlays, do not involve monetary contributions. Such services are well illustrated by collaboration in the control of crime. The Federal Bureau of Investigation maintains criminal statistics which are extremely valuable to local police in the identification and capture of criminals. It maintains a complicated card index of criminals apprehended throughout the United States and makes its information available to local police. It offers its services for interpretation of evidence which local police departments are as a rule unable to provide. Articles in some way connected with a crime such as clothing, money, bedding, household furnishings, and even automobiles and innumerable other items are from time to time sent to the FBI for discovery of the stories which they have to tell. The often amazingly successful interpretations are given in aid of local police efforts. Innumerable other types of police information are given by FBI agents to local police and to a lesser extent by local police to the FBI. Federal public health officers collaborate with local officers. Other federal and local officers likewise work together toward common ends.

Aid Through Bankruptcy. The federal government aids local govern-

ments in another way, not by giving them financial assistance but by enabling them to escape from intolerable financial burdens. It has long been possible for private individuals, under a federal bankruptcy statute, to relieve themselves from their financial obligations by turning over their assets for distribution among their creditors. Until early in the New Deal period it was not possible for governments to escape their obligations in similar fashion. One of the difficulties was that a government cannot turn over its assets and go out of business as a private individual can. Something had to be done, however, to relieve many local governments of burdens of debt which they could not carry. Many of the governments in distress, it is true, were not conventional cities, towns, or villages but agencies of comparable legal status which had been organized as irrigation districts or water districts with powers to issue bonds and collect taxes to provide for irrigation or other local functions. After the collapse of land values which came with the depression, many such districts were unable to collect enough taxes to pay their debts.

In 1934, Congress attempted relief by enacting what was commonly referred to as a municipal bankruptcy law. It provided not for the liquidation of the assets of the governments involved as in much of private bankruptcy, but rather for what was called the "composition" of debts by reducing indebtedness to a figure which could be met by local taxation or some other device. The statute applied only to local governments and not to state governments and was applicable only when authorized by the states. The Supreme Court, apparently horrified by the sweeping extension of federal power both over the rights of private property and over jurisdiction which, if it belonged to any government at all, was deemed properly that of the states, held the statute unconstitutional.[12] In 1937, however, after a new trend in Supreme Court decisions had apparently been stimulated by a threat to pack the Court with new members, Congress enacted a similar measure and the Supreme Court upheld it.[13] Local governments, therefore, are now in a position under federal law to scale down debts which they are unable to pay. Although they can take such action only with the consent of the states from which they derive their legal existence, the power in question is derived not from the states but from the federal government.

CONTRACT RELATIONS AND REGULATORY CONTROL

Contract Services. The federal government may greatly influence the course of urban life and mold the conduct of urban governments by rendering services under contract. Examples are provided by the sale of public power to municipalities by the Tennessee Valley Authority, the Bureau of Reclamation, and the Bonneville Power Administration. In many instances,

12. *Ashton* v. *Cameron County Water Improvement District,* 298 U.S. 513 (1936).
13. *United States* v. *Bekins,* 304 U.S. (1938). Railroads which, like local governments, are extremely hard to liquidate for payment of debts may scale down their debts in similar fashion.

such sales have meant shifts of municipal business from private to public enterprise. Municipalities have been encouraged by the federal government to build or acquire their own distributing systems for electricity, often with the aid of federal grants or loans. They enter into contracts with a federal agency by which, in the purchase and sale of electricity, they bind local governments for years to come. Although municipalities must as a rule have consent of state governments before they can make binding contracts of this kind, a substantial amount of federal control is exercised once the consent is given and the contracts are made. Examples are provided by the contract form employed by the Tennessee Valley Authority and municipalities in and adjacent to the valley which utilize TVA electric power. The contract made in April, 1948, between the Tennessee Valley Authority and the city of Aberdeen, Mississippi, contained the following restrictions on city activities:

> Municipalities shall in no event obtain, by generation, by purchase, or otherwise, power from any source, other than Authority's electric system, without the consent of Authority, unless Authority has refused to supply Municipality such additional quantities of power as may have been applied for as provided herein, and then only to the extent of its requirements in excess of the power available from Authority. Should Municipality, during the period of this contract, desire to increase its purchases of power in excess of the maximum provided for herein, the Municipality may apply to Authority for additional quantities of power. Such application shall be in writing and shall be supported by proof of probable need for such additional power.[14]

Again,

> It is hereby recognized and declared that, pursuant to the obligations imposed by the Tennessee Valley Authority Act of 1933 as amended, Municipality's operation of a Municipal electric distribution system and Authority's wholesale service thereto are undertaken primarily for the benefit of ratepayers and that Municipality shall receive from the operation thereof for the benefit of general funds, to be used for any permissible Municipal purpose, only (*a*) a return on any investment made from general funds in the electric system, and (*b*) an amount in lieu of taxes, representing a fair share of the cost of government properly to be borne by such system. In accordance with these principles, which are mutually recognized as of the essence of this agreement, Municipality agrees to operate its electric system and to maintain its financial accounts and affairs in full and strict accordance with the provisions of this Power contract.
>
> Municipality further agrees from time to time to supply Authority promptly with such information in respect of its electrical property and operations as Authority may reasonably request, including, not later than the first day of September of each year, a complete report, in such form as may be requested, of the transactions of the electric department for the preceding year ending June 30 and of the assets and liabilities of its electric department as of June 30.

Such arrangements between a municipality and a federal agency commit the municipality to public operation of a utility, limit its freedom of

14. *Annual Report of the Tennessee Valley Authority,* 1948, p. A39.

choice as to the source of the electric power which it will use, subordinate its judgment to that of the federal agency in some degree as to the amount of electric power it will consume, commit it to giving first consideration to the benefit of rate payers, prescribe to some extent its methods of accounting, and in other ways subject the municipality to the influence and supervision of the federal agency. The federal government has assumed that such supervision is necessary if it is to fulfill its own obligations to the people. Many municipalities have submitted to it because of the obvious community benefits to be derived through purchase of electric power from the federal government at rates substantially lower than those of private corporations. Most of the states involved have willingly acquiesced in such arrangements. Private power companies have sought to protect their own interests against devastating federal competition by challenging the validity of federal supervision of this kind. In one such case, the Court of Appeals of Kentucky held invalid a contract between the city of Middlesboro and the Tennessee Valley Authority on the ground of its conflict with state statutes which conferred upon the city council and the city utility commission broad jurisdiction over local matters which could not be legally delegated to a federal agency.[15] In general, however, TVA contracts and others of this kind have been held valid.

Federal Regulatory Agencies. Federal regulatory agencies operate on matters closely affecting local governments. Where electric power is provided by other than federal sources and where interstate commerce or the generation of power at dams in navigable streams is involved, the licensing and regulatory powers of the Federal Power Commission affect local rates and local regulations. In similar fashion, the Federal Power Commission exercises jurisdiction over natural gas which is moved in interstate commerce and restricts construction of new transportation lines when gas is in short supply. The Civil Aeronautics Board regulates the operation of aircraft even at city-owned airports. The Federal Communications Commission licenses all municipally-owned broadcasting systems including those operated by municipal police. The Securities and Exchange Commission has jurisdiction to punish fraud in the sale of municipal securities. These varied types of federal regulations and others not here mentioned mark gradual expansion of the power of the federal government down into the area of local government, thereby restricting somewhat the powers of the latter and creating uniformities among local governments throughout the country. The total of local governmental activities is not necessarily curtailed. Such totals, indeed, as has been said elsewhere, are steadily expanding. They are expanding, however, under the guiding influence not merely of the state governments of which local governments are legal offspring but under the influence of national supervisory power.

15. *City of Middlesboro* v. *Kentucky Utilities Co.*, 284 Ky. 833, 146 S.W. (2d) 48 (1940).

FEDERAL RESTRICTIONS ON LOCAL GOVERNMENT

Taxation. Upon local governments as upon the states, the federal government enforces many constitutional restrictions. Some of these operate in the field of taxation where local government may not tax in such a way as to take property without due process of law or deny equal protection of the laws or encroach upon areas of federal jurisdiction. Persons and corporations seeking to escape the burdens of legal taxation, it is true, sometimes advance claims under the Fourteenth Amendment which the courts refuse to recognize. In one such instance a power company claimed denial of both due process and equal protection by an ordinance of the city of Seattle which levied an excise tax on the gross income of the power company, but which failed to collect a comparable tax upon income derived by the city from competing power facilities which the city operated.[16] The Supreme Court holds that nothing in the Constitution protects private corporations from competition of government agencies or requires that in the competitive situation private corporations shall be given equal treatment.

Local governments, like states, may not levy taxes which discriminate against interstate commerce. Recognizing the needs of both state and local governments for new sources of revenue, the Supreme Court during the New Deal period went a long way in upholding sales taxes and other taxes which had close relations to interstate commerce. In 1940 the Court upheld a New York City sales tax on coal which had been brought into the city from another state for local consumption. Said Justice Stone,

> It was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business. . . . Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless falls short of the regulation of the commerce which the Constitution leaves to Congress.[17]

The Court balked, however, when asked to uphold the right of a city and county to levy taxes upon a federal housing project in Cleveland which Congress had exempted from local taxation. The local governments contended that the federal government could not in entering the fundamentally private business of housing immunize local property from local taxation. Here, as with the desire of local governments in the Tennessee Valley to collect money from the federal government in lieu of normal taxes on property which the federal government had acquired, the Supreme Court may well have regarded the local action as comparable to an attempt to "tax Santa Claus for the privilege of coming down the chimney." At any rate, it held unanimously that Congress might exempt property owned by

16. *Puget Sound Power and Light Co.* v. *Seattle,* 291 U.S. 619 (1934).
17. *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U.S. 33, 46–47 (1940).

the United States or one of its instrumentalities from local taxation when acting in furtherance of the purposes of federal legislation.[18]

Police Power — Zoning. In the exercise of its police power — that is, the power to act in the interest of the health, safety, public morals, and public welfare of the people — a municipality may enforce various kinds of regulations on the use of property and may place restrictions on civil liberties. Here again, however, the federal Constitution is a barrier to excessive and arbitrary action. Among the legitimate powers are those to regulate the height of buildings, the materials to be used for construction, the standards of construction, the installation of plumbing and electric wiring, distance of construction from streets and alleys, the arrangements of hotels and apartment houses for dealing with fire or escaping from burning buildings, the disposal of sewage, the disposal of trash, and innumerable other subjects.

The limits of constitutionality are reached as government begins to prescribe the uses to which privately owned property can be put. The Supreme Court has upheld zoning requirements that some districts be used only for residential purposes whereas others are available for business also. Gradations may be established which separate apartment house areas from those for single dwellings on the one hand and for business on the other.[19] Such limitations on the use of private property, however, have their own limits. The Supreme Court has held, for example, that an owner of property bordering on a factory and railroad district which is unsuitable for residential purposes because of the character of the neighborhood is deprived of his property without due process of law by a zoning regulation which classifies it as residential property and permits its use for no other purpose.[20] The Supreme Court also held unconstitutional a zoning ordinance which made the right to maintain a home for the aged in a particular district dependent upon consent of the owners of two-thirds of the property within four hundred feet of the proposed building.[21] Private rights may not in this fashion be subjected to the whims of the surrounding neighborhood.

The Supreme Court has given no support whatsoever to the efforts of municipalities to solve local race problems by excluding Negroes, Orientals, or people of other racial groups from particular areas. In 1917, the Court held that the due process clause of the Fourteenth Amendment was violated by an ordinance of the city of Louisville which prohibited colored people from living in any city block in which the majority of residences were occupied by white people.[22] Since the Fourteenth Amendment limits the activities only of states and the local governments which are legally only extensions of states, the dominant interests in many cities thereafter

18. *Cleveland* v. *United States,* 323 U.S. 329 (1945).
19. *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926).
20. *Nectow* v. *Cambridge,* 277 U.S. 183 (1928).
21. *Washington ex rel. Seattle Title Trust Co.* v. *Roberge,* 278 U.S. 116 (1928).
22. *Buchanan* v. *Warley,* 245 U.S. 60 (1917).

attempted to zone against minority racial groups without resort to governmental action. The principal technique has been that of requiring purchasers of houses and lots in selected residential areas to sign covenants agreeing not to sell property to particular racial groups. In this manner exclusion has been practiced not by municipalities, which are subject to the Fourteenth Amendment, but by private parties who are not subject to it. There is apparently nothing necessarily unconstitutional about such covenants. However, if one of the signers of the covenant violates it and sells property to a member of the proscribed race and an attempt is made to enforce the covenant to nullify the sale, the situation is changed. Enforcement of the covenant requires action of a court. The court is an instrument of a state or local government. State and local governments are forbidden by the Fourteenth Amendment to use their powers in such a way as to deny equal protection of the laws, with the result that the covenant of exclusion cannot be enforced.[23] While no property owner has any legal obligation to sell his property to a member of any minority group, and while he may enter into an agreement with his neighbors that none of them will make such a sale, he cannot rely upon any court to enforce the agreement if perchance any party to it sees fit to violate it.

Limitations on Personal Freedoms. Local governments may in various ways limit personal freedoms as well as rights of property. Justice Holmes once remarked that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[24] Freedom of speech, freedom of the press, freedom of religion, and freedom of assembly may be restricted to the extent necessary to prevent serious public disturbances and injury to the public welfare. On the other hand, a municipality may not use an inadequately demonstrated public need as an excuse for unnecessary curtailment of fundamental freedoms. Labor groups and others may not be denied the use of public meeting places merely because officials of local governments disapprove of them.[25] The Supreme Court has held unconstitutional a number of municipal ordinances which limited the evangelical activities of a religious sect known as Jehovah's Witnesses. The regulations sought variously to prevent distribution of religious literature without first securing a license, to prevent solicitation from door to door, and to prevent the playing of evangelical phonograph records in public places.[26]

The line between what is and what is not permissible, however, is very finely drawn. In 1948, with four justices dissenting, the Supreme Court held unconstitutional a municipal ordinance which forbade the public use of sound amplification devices except with the permission of the Chief of Police, who was allowed full discretion as to whether or not permission

23. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).
24. *Schenck* v. *United States*, 249 U.S. 49, 52 (1919).
25. *Hague* v. *C.I.O.*, 307 U.S. 496 (1939).
26. For brief discussion and citation of cases see Carl B. Swisher, *American Constitutional Development*, p. 979.

should be granted. The Court held that the ordinance restrained freedom of speech on the part of a minister who was denied renewal of a permit to use sound amplification for religious services in a public park.[27] On the other hand, in 1949, again with four justices dissenting but with changes in the dissenting personnel, the Court upheld a municipal ordinance applicable to sound trucks which forbade the use of vehicles with sound amplifiers emitting loud and raucous noises.[28] The divisions on the Court and the shifting positions of the justices demonstrated the difficulty of choosing between the right of the public to be protected against nerve-wracking noises and the opposing right of speakers to make themselves heard with the maximum volume and at maximum range.

So it is that on the whole the federal government and the major municipalities of the country are coming closer together as the welfare of the United States becomes more and more one welfare rather than an aggregate of diverse welfares. The characteristics and needs of our various municipalities still differ greatly one from another. To the extent that problems are local and can be met by local action we need local government, both for the better solution of the problems and for the better working of democracy. For all the corruption and inefficiency of some of them, it is no doubt better that municipal governments should run our cities than that the federal government should take over, even if we could count on its governing efficiently rather than expensively and inadequately as in the District of Columbia. To the extent that city welfare and city activities are involved with the welfare of the nation, however, it may not be possible to let local welfare sink to the level of performance of some municipal governments. It may be necessary to maintain national as distinct from local minimum standards for housing, public health, and education. It is certainly necessary to regulate industry, transportation, and labor relations on a national rather than a local pattern. However broad the scope of national regulation, it will leave a great deal for municipal governments to do, but there is no denying that some of the flavor of localism and some of the reality of self-government are lost as both government and industry take on increasing uniformity throughout the country.

References

Victor Jones, *Metropolitan Government* (University of Chicago Press, 1942).
Stewart A. MacCorkle, *American Municipal Government and Administration* (Heath, 1948).
Austin F. MacDonald, *American City Government and Administration* (Crowell, 4th ed., 1946).
Lewis Mumford, *The Culture of Cities* (Harcourt, Brace, 1938).

27. *Saia* v. *New York,* 334 U.S. 558 (1948).
28. *Kovacs* v. *Cooper,* 336 U.S. 77 (1949).

The Municipal Year Book (Published annually, International City Managers Association, Chicago).

National Resources Committee, *Our Cities: Their Role in the National Economy* (Government Printing Office, 1937).

———, *Urban Governments*, vol. I of the Supplementary Report of the Urbanism Committee to the National Resources Committee (Government Printing Office, 1939).

———, *Urban Planning and Land Policies*, vol. II of the Supplementary Report of the Urbanism Committee to the National Resources Committee (Government Printing Office, 1939).

———, *Federal Aids to Local Planning* (Government Printing Office, 1941).

Donald C. Stone, *The Management of Municipal Public Works* (Public Administration Service, 1939).

PART NINE ★ *Conclusion*

39

Liberty and Control

The purpose of this chapter is not to add more facts to what has gone before but to raise questions about interpretation of the panoramic survey of our government institutions. In particular it is to call attention to the conflict, the give and take, between liberty and control which appears in all the varied operations of our governmental system. Government exists for the exercise of control. That is its sole purpose. Yet the purpose of control under our system of government is in part to preserve liberty, which involves limitation of control by any external agency. We expect government to protect political liberties, which represent the right of the citizen to participate in government; to protect civil liberties, which include freedom of thought and speech and assembly and the right to the protection of constitutional procedures; and to protect personal liberties, which include freedom of religion and the right not to be harassed in innumerable other matters. To these are sometimes added human liberties, including the right of self development and the achievement of human dignity, and economic liberties, which include the right to select one's own employment and the right to buy, to own, and to sell property in the exercise of one's own judgment.[1]

Our difficulty lies in drawing a line between the rightful spheres of liberty and of control. Neither can be an absolute; or at any rate, liberty can be an absolute only in a state of complete anarchy, and control can be an absolute only in a totalitarian state where all liberty has been extinguished. It may be questioned whether liberty could flourish amid the chaos which anarchy implies, and whether control which reached the state of absolutism would not ultimately stultify the dynamics from which the control itself derives. Indeed, liberty and control are both indispensable for the well-being of any society, and are in a sense functions of each other. The function of each is to promote the welfare of the people who are governed or whose liberties are preserved.

Since there are no "natural boundaries" between the areas of liberty and control, each society needs to draw the boundary line for itself and to

1. See Chester Bowles, "The Five Liberties of True Democracy," *New York Times Magazine*, May 28, 1950.

reexamine its location from time to time in the light of changing needs. Of the two, what are the purposes of control? One purpose is protection against external enemies. It would be national foolishness to ignore the necessity for such protection. How much and what kind of protection should be provided? Obviously the situation will differ with the nature of national boundaries and the potentialities of possible enemies. At some undefined stage any country could spend so much on national defense as to impoverish itself internally. It could so build up its military leadership as to lose all liberty to that leadership. It must look at the situation and attempt an intelligent decision in the face of the complicated set of risks.

One of the purposes of control is to protect the right of the people to do business among themselves as they see fit. How far can government go in giving this protection? At one extreme it can guarantee economic anarchy — and chaos. At the other extreme it can go so far in protecting one man against another that business bogs down in a mass of confusing regulations. It has to find an area of workable compromise. It must police but it must not destroy. Again, government must see that to some extent the wealth of the country is shared by all the people, or at any rate by all the people who will do what they can to add to that wealth. But if it goes too far toward distributing the goods of the country it will destroy productive enterprise and bring about the waste of resources. If we distribute all that we have to the unemployed, or to the aged, or to the veterans, we shall eventually impoverish even the aided groups.

Government then must be a planning agency as well as an administrative agency for society. It must plan at least to the extent of deciding how far in each of many directions it will go in protecting the people and in serving their interests. Since the beneficiaries of its planning — or the sufferers, as the case may be — are the people themselves, it is in this fact that we find much of the justification of democracy. The people have a too vital interest in the doings of government to leave them to self-appointed rulers. Since the control to be exercised is control over the people for the good of the people, it is obviously they who should make decisions about the scope of the power to be exercised over them.

The justification of liberty is even harder to phrase than the justification of control. The statement easiest to make but perhaps hardest to analyze is that liberty is a natural right and therefore needs no justification; being a natural right, it is its own justification; there is need, rather, to justify all interference with liberty, whatever the source of the interference. To say that liberty is a natural right is to say that it is a fundamental characteristic of man in the universe and that to deny liberty is to distort the plan which God has conceived for his creatures. If we assume liberty as a natural right we escape the necessity of further attempting to justify it, but we are left with the comparably difficult task of explaining what it is. The content which we give to the term has to be consistent with the entire pattern of God's plan. Assuming that He did not intend his creatures to be mere robots, they must have a measure of freedom from control. However,

complete absence of control in thickly settled areas would mean disorder and economic chaos, which presumably is none of God's plan and is therefore not to be classified as a natural right. To the extent that liberty is freedom from control, it must presumably be that kind and amount of freedom which will result in the working out of the plan of the universe, and we shall have a complete definition of it only when we have discovered the details of that plan. Such a discovery is a large order indeed. Philosophers, social theorists, economic theorists, political theorists, religious theorists, and scientists have attempted it from time to time but with lamentable lack of success. To the extent of their failure to discover the universal plan they fail also to define the nature and scope of natural liberty.

Difficult as the task is, there is reason to suspect that most of us have at least vaguely in mind an ideal social order, a kind of universal plan, when we attempt to define the nature and scope of liberty. We articulate only part of it, however. We say, for example, that men must be free in order to realize their best selves, assuming that self-realization is one of the fundamental purposes of life. We assume the necessity of a measure of control, but we assume also the necessity of maintaining that eternal vigilance which is said to be the price of liberty. To that end we in the United States believe in democracy, in government by the people themselves. Knowing that even popular majorities can become tyrannical, can unnecessarily interfere with liberty in the process of governing, we set up constitutional safeguards against the operations of even democratic government. That is, we curb our right to govern lest in governing we unnecessarily curtail liberty. Even assuming that the voting majority of the people could be trusted not to invade the area of liberty, we know that the majority must delegate to minority groups the power of governing, and that the minority, whether civil or military, can get drunk with the sight of power and invade the liberties which in part government exists to preserve. We restrain government for the preservation of our liberties in order that liberty may not be destroyed by its protectors.

We are eternally faced with the question of how much and what kind of liberty we shall attempt to preserve, and how much and what kind of control we shall exercise for its preservation and for the preservation of the other characteristics of a good society. We reach decisions piecemeal, almost always without thinking out our whole philosophy of government. We submit to direction by a combination of tradition, social pressures, and the necessities of the hour. Tradition, though less manifest than social pressures and the events of the moment that compel changes, still works its powerful influence. We are not far from our forefathers who walked devoutly in the path of the common law. We are even less far from our forebears who looked to the Constitution as the lamp by which our feet should be guided. Even yet, however much we may talk of the obsolescence of the common law and of the *laissez-faire* attitudes which were read into the Constitution, force of habit, fondness for ritual, and lack of knowledge of anything better keep us on many traditional paths of behavior. We

have no desire completely to break with the past; and, traditional beings that we are, we could not make a complete break even if we wished. It is of the nature of mankind that it must move in part in the paths of its forefathers, striving as it does so to make necessary adjustments to the necessities of a new day.

It is the gift of tradition that it preserves for us the best of our heritage, the experience of the race in earlier years. From our American and European heritage we have learned many lessons about what to do and what not to do in the process of governing. We do not have to rethink all problems, to redemonstrate all facts about the governing process. The difficulty comes at the point where "time makes ancient good uncouth." Not all the techniques and processes which were adequate for our forefathers are adequate today, however great the tendency to regard them as immortal. It is not conclusive to argue that the federal government should not today collect income taxes or support a social security program or maintain a national health program because it did not do so a hundred years ago. Yet it required during the early 1930's a great deal of painful experience to demonstrate the necessity for wholesale federal relief of the unemployed in contrast with reliance upon private charity and relief provided by local governments. It required similarly painful experience to demonstrate the fact that, as a result of the fundamental changes which had been taking place in our economic system and of the extent of urbanization of our society, the federal government must permanently supplement or even supplant varied activities of private individuals and local governments if normal economic operations were to be resumed. It required vision, a display of creative imagination, and a great deal of determination to modify long established governmental relations with economic enterprise and set up drastic continuing controls to meet the needs of a new order.

Because people distrust modification of what they regard as fundamentals, it is not surprising that new governmental programs provoke resentment and resistance in the people whose immediate interests are adversely affected and who believe that by and large the old ways are the right ways and ought not to be changed. The difficulty of persuading people to think out their programs and to initiate and support new and more highly integrated programs of public behavior is further illustrated in the field of national defense. It required a second World War to prove to many of us that isolation was no longer possible. We had continued to think in terms of the isolationist advice of President Washington's farewell address long after changes in technology and in modes of transportation had eliminated any real possibilities of isolation from any habitable portion of the globe. We learned a great deal from recent and costly experience. Some evidence of our learning was indicated by the speed with which we accepted membership in the United Nations, by contrast with our flouting of the earlier League of Nations. As a result of repetition of painful experience in international relations, in other words, we belatedly became to a certain extent world-minded rather than merely nationally-minded.

It remains to be seen, however, how far we are ready even yet to go in remolding our pattern of living for the purpose of adapting that pattern to the world conditions amid which we live. Tradition still has a binding grip on us, influencing the nature and scope of control and the boundaries of liberty to be maintained. The average American who looks up at the hills or across the prairies of a peaceful United States sees little reality in warnings that a new order, symbolized by the atom bomb and by non-stop airplane flights around the world, demands fundamental changes in governmental patterns if the American civilization and its basic values are to survive. It has been wisely said that many people can more easily accept their own extinction than complete reorientation of their thinking, so hard it is to think constructively outside patterns to which we have been accustomed. Adherence to tradition has tragic implications if it means that the rootage of men's habits and beliefs prevents the readjustments necessary for their own survival.

Both military and civilian leaders have long deplored the fact that military operations themselves get caught in the traditional grip. Until the period since World War II, when the momentum of new inventions for the war just ended has carried over to competitive preparations for another possible war, military groups were notoriously reluctant to change from old to newer and more effective methods of warfare. Conventional generals have been known to react to the enemy's use of new weapons and new tactics as if he were to be condemned for violating the "rules of the game." Because the use of cavalry was for centuries a proud military tradition, it took a long time to eliminate the use of horses after mechanized equipment had rendered them obsolete. It took years of struggle to bring about adequate use of military air power in the face of a military bureaucracy which was convinced that respectable wars were fought only on land or occasionally on water. The sharp current rivalries among the Army, the Navy, the Air Force, and the Marines is due in part to bureaucratic narrow-mindedness which makes it impossible for each service to see anything good in organizations, methods, and techniques different from their own. It is not so much judgment, therefore, as the resisting power of tradition and vested interest that determines the area and scope of control.

Like the military, the peacetime governmental establishment is also to a considerable extent trapped in its own ritualism. Government departments and lesser agencies get entrenched in fields of action and in patterns of behavior and continue to function in those areas and according to those patterns in spite of the need for continued adjustment. Vested interests of particular groups in society, such as agriculture, labor, and particular businesses, establish themselves in comfortable relationships with government departments and thereafter oppose departmental changes which might jeopardize their positions. Particular groups within departments get established in hierarchies of power which in their own interest they seek to defend. So it is that combinations of interest and tradition tend toward stultification. So it is that a Hoover Commission or any other agency given

responsibility for proposing important changes in government encounters tremendous resistance to every kind of proposal. So it is that, in time of war or other crisis, it is often easier to establish completely new agencies to perform new functions than to reorganize and redirect older agencies.

Traditionalism has its grip not only on subordinate organizations but on top leadership even of the three major branches of the government. Congress finds itself caught in a network of practices and routines, including too many committees and a hampering seniority system, which interfere with the creative performance of its responsibilities. It enacts measures such as the Reorganization Act of 1946 to loosen the grip of obsolete ritualism; yet deeply ingrained habits of behavior and the knowledge that particular things have in the past been done in particular ways tend to perpetuate old forms and mechanisms and old ways of viewing the relations between Congress and the other branches of the government. Every new President finds himself quickly steeped in tradition as to how the President should act and what he should do. Even Franklin D. Roosevelt, who it sometimes seemed counted that day lost in which no precedents were shattered, actually entrenched himself deeply in the kind of institution which had been established by George Washington and had been given content and vitality by such other strong Presidents as Jefferson, Jackson, Lincoln, Theodore Roosevelt, and Wilson.

As for the judiciary, it goes to some extent beyond the legislative and executive branches of the government in that to a considerable extent it is by tradition devoted to the maintenance and perpetuation of tradition. Its task is to apply the law of the past to the conditions of the present. Although members of all branches take an oath to support the Constitution, the judiciary more than any other branch is expected to articulate from the heritage of the past those permanent values that are to be preserved in a changing social order. In spite of this fact, however, the judiciary, like other government agencies, can perform its task badly rather than well. It can take a niggardly view of ancient values. It can preserve old forms which fit badly into the patterns of current phenomena instead of merely extracting from them the essences which gave old forms their values in other settings. It can interpose dogmas as barriers to the achievement of current well-being, often seemingly unaware that it is the spirit of the law rather than its letter that giveth life — and properly delimits both liberty and control. Although the Constitution imposes on the judiciary a task which yields great values if greatly performed, the task must be performed creatively or it will merely stultify.

If tradition and habit incorporate both good and bad, both the useful and the obsolete, as they influence the give and take between liberty and control, the pressures which play upon government often seem similarly non-moral. Success of a powerful military lobby in channelling immense resources into preparation for possible war might save us from a powerful enemy or it might merely impoverish us and make us all the more vulnerable to attack at a later date. The lobby of the American Medical Associ-

ation to save "free enterprise" in the medical field by opposing "socialized medicine" may or may not be preserving an area of liberty which under modern conditions ought to be preserved. The businessmen and their political spokesmen who fight what they call "socialism" in American government while seeking ever greater power for business corporations may or may not be defending liberty in any genuine sense. But whatever the merits of individual controversies, pressures of powerful groups go a long way to determine the extent of modification of old ways of doing things. The choices among degrees of liberty and control and kinds of liberty and control are made in no small part by the weight of blind pressures from great concentrations of power.

In addition to tradition and the drive of concentrations of power, national crises catch us in their sweep and leave us permanently conditioned by the experience, largely without choice on our part. It was not our choice that we were caught in either of the recent world wars or in the depression of the 1930's. We were caught, nevertheless, and we shall never be the same again. We are self-governing within the area of choice which nature and the world we live in leave to us, but we are not altogether free. There is a control in the drive of world events which from time to time greatly modifies the patterns of behavior which represent our choice.

Our partial helplessness against the sweep of world events illustrates the point that in the discussion of liberty and control we need to look deeper than democratically chosen political programs. We must think as broadly as the range of the influences which bear upon us. We must remember that even in victory over opposing forces something of the drive and the character of the defeated party penetrates into our midst and wins a measure of victory over us. We do not yet know how much of nazism and fascism we absorbed in the process of defeating Germany and her allies, but we may have reason to fear a deep taint reaching far into our military, political, and economic institutions. The "cold war" with the Soviet Union had not long been under way after the close of World War II when the grossness of "enemy" performance began to be sensed in American reactions to Soviet strategy. It is not inconceivable that in the course of a long "cold war" with its corroding impact on our standards and our thinking in the field of human relations we might lose much of the unique value of our culture without extensive resort to military combat. Choices in the area of liberty and control come not merely out of careful and considered deliberations but out of the total atmosphere of human relations.

The point needs to be elaborated even as to our internal choices. What we shall do about liberty and control is not to be measured by looking at government alone. Control is exercised by a vast assortment of institutions other than those which we call government. The actual choice in a given situation may be not a choice between liberty and control but between control by official government and, for example, the General Motors Corporation, the United Automobile Workers, the American Farm Bureau

Federation, the Roman Catholic Church, the Associated Press, or any one of a number of other powerful aggregations. It may not be a matter of how much government but of what kind and by whom. Nominal struggles over liberty and control are likely to be in no small part struggles between would-be governors. This is not to say that all aspiring governors would govern alike, that all have the same insight into our problems, or that all have the same standards for measuring the public welfare. There are differences, and it behooves a self-governing people to know what the differences are and to make choices accordingly. We need to use insight and discrimination in appraising not only big government but big business, big agriculture, and big labor. We have to remember that government, business, agriculture, and labor are not what they were a quarter of a century ago. All are in transition. It is a matter of concern to us where they are and from what and to what they are changing.

There is another important factor in the appraisal of our institutions. The nature of liberty and control will depend not only on the behavior of the agencies to which governing power is allocated but also on the behavior of the people governed. Given intelligent, thoughtful, and self-disciplined people, almost any kind of government could be made to work in the public interest. Intelligence, thoughtfulness, and self-discipline are particularly needed in a democracy. When we talk about democracy as the ideal type of government for the United States we assume not only a literate population but also the capacities necessary for the exercise of sound judgment in important matters. An ignorant and slothful people will waste resources instead of developing them, will fight among themselves instead of working toward creative compromise, will fritter away energies instead of gathering the fruits of unified action. Perhaps largely without thinking the problem through, we have counted on the discipline to be gained by life in a pioneer country as serving to weed out the unfit, educate those capable of education, and provide the discipline necessary for self-government. If this is true then we should face the possibility that the capacity of our people to govern themselves may be vastly changing as we approach the conditions of a welfare state wherein society nourishes the weak as well as the strong and smooths the path of oncoming generations instead of leaving them to shift more largely for themselves. This is not an argument for attempting to restore pioneer conditions in the midst of a mass-production economy. Mass production and mass distribution imply a high degree of collectivization, either through corporations, labor unions, and other forms of so-called private organizations or through government. There can be no return to a high degree of individual responsibility while maintaining an economy in which each individual must serve as a cog in a gigantic machine. The point is merely that cogs are not likely to adapt themselves well to genuine self-government, and this fact may foreshadow drastic changes in the character of our democracy.

There are powerful and at times intellectually influential groups in the world which reject the tenets of democracy and regard its survival on a

large scale as accidental and temporary. They hold that people in general are not competent to govern themselves and that the potentialities of mankind are not realized through liberty and self-government but through submission to born leaders and acceptance of the doctrines sponsored by their leadership. The doctrine of the divine right of kings which traced the right of kingship back to God was long used in many countries to justify the king's claim to popular obedience. The development of Benito Mussolini's leadership in Italy found sanction in social doctrines which maintained that the function of individual men was to subordinate themselves and render service to the state. Adolf Hitler and his Nazi party in Germany paid lip service to similar doctrines. The Nazis demanded a mystical acceptance of the leadership of their Fuehrer and faith in his intuition. They sponsored anti-rationalist doctrines, scoffed at democracy as an effective device under any circumstances, and proclaimed the decadence of democracy wherever it was then in operation. Like the Fascists, the Nazis thought of the populace as fit only to be governed and not at all fit for self-rule.

Communists as they have operated in the Soviet Union and in the satellite states talked for a time in terms of the dictatorship of the proletariat and later in terms of democracy. Their dictatorship of the proletariat and likewise their democracy, however, have operated in practice as government of the many by the few. They show no evidence of attaining in the foreseeable future the Marxist objective at which classes will disappear and the state will wither away. Communist leaders maintain not only rigid control over the conduct of their subordinates but a control over belief which is far broader in scope than that attempted under other regimes. They proclaim dogmas on politics, economics, science, art, and other fields which must be unquestionably accepted and adhered to by the Russian people.

Yet the arguments of Russian communists are no more to be accepted on purely intellectual grounds than are the arguments of other dogmatists. The most significant fact about them as political theorists is that as communists they are not only communists but also Russians. In trying to break with a portion of the Russian tradition they have abolished an absolute monarchy, but they have substituted for it a comparable form of absolute rule by the self-appointed sponsors of the "dictatorship of the proletariat." They are caught in the grip of their own national tradition, which has in it none of the elements of democracy. Of liberty they know nothing except as the inefficiency of their government in times past has left to them a measure of interstitial freedom. In their leaders, therefore, we can expect to find no sympathy with or real understanding of the essence of democracy, and we have no occasion for surprise that their use of the term in connection with their own government has turned out to be for propaganda purposes alone.

As Americans we do not need to concern ourselves primarily with what Reinhold Niebuhr has called "the pathetic mixture of moral cynicism and utopian illusion which characterizes Russian culture." Our responsibility,

as he points out, is for the sickness of our own culture. Both Marxism and classical liberalism

> obscure the fact that the root of man's lust for power and of his cruel and self-righteous judgments on his fellows is in himself and not in some social or economic institution. If man understands that fact, he can use and refashion political and economic institutions to harness, deflect, or suppress human egotism. If he does not understand it, civil wars arise between those who regard some institution, such as property, as the root of all social virtue and those who regard it as the root of all social injustice.[2]

The problem of the scope and nature of liberty and control, therefore, goes back not only to the tradition in which governing power is exercised but also to the nature of mankind itself. It roots ultimately in problems of psychology and perhaps of religion — it roots certainly in the problem of ethical standards conceived and realized among the people. Our fitness to govern ourselves is to be measured by the kind of people we are. On that subject it is hard to be objective even if we had adequate standards for measurement.

Although our primary concern is with government of the people by the people in the United States, we have in the offing a series of even more complicated problems. In a world rapidly growing smaller we must increasingly share in a community life which is worldwide in scope. As far as the fundamentals of human nature are concerned, we can no doubt assume that the peoples of China, India, western Asia, eastern Europe, and other parts of the world, by whom we are overwhelmingly outnumbered, are not too different from ourselves. If in our own culture, however, and in that of the Soviet Union, ways of thinking about liberty and control are deeply conditioned by national traditions, the same is also true among other peoples. We can expect strange mixtures to come out of the amalgam of differing cultures as the many groups make their contributions to world patterns. We need as fully as possible to understand the aims and the motivations of alien peoples and also to think out what is most worth saving in our own culture and most worth fighting for as we shape the outlines of "one world." Both because we are outnumbered and because other peoples may have contributions to make which for world purposes may be superior to our own, we cannot afford to be provincial. We must be world-minded. But to the extent that we have values which are worth fighting for, we must know what they are and be ready to defend them with all the aggressiveness and discretion in our repertoire. Never in our history has there been greater need for self-understanding, for the self-assurance which is not inconsistent with humility, and for the diplomacy and power necessary to make us effective among the peoples of the world.

2. Reinhold Niebuhr, "The Sickness of American Culture," *Congressional Record,* March 13, 1948, vol. 94, part 2, p. 2740.

The Constitution of the United States of America

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes [1] shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.[2] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof,[3] for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.[4]

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

1. See the Sixteenth Amendment.
2. See the Fourteenth Amendment.
3. See the Seventeenth Amendment.
4. See the Seventeenth Amendment.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.[5]

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on

5. See the Twentieth Amendment.

the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the

Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of the Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State have one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.[6]

6. The paragraph is superseded by the Twelfth and the Twentieth Amendments.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Law be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State;[7] — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect Thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[8]

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

The Congress, whenever two thirds of

7. Restricted by the Eleventh Amendment.

8. See the Thirteenth Amendment forbidding slavery.

both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In witness whereof we have hereunto subscribed our Names,

Gº. WASHINGTON — *Presid't and deputy from Virginia*

Attest William Jackson *Secretary*

[Other signatures omitted]

AMENDMENTS

ARTICLE 1 [9]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE II

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

ARTICLE III

No Soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and

9. The first ten Amendments became effective in 1791. Two states, Georgia and Massachusetts, failed to ratify at that time, but did so in 1939 as a gesture in behalf of national unity on the subject.

particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

ARTICLE VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI [10]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

ARTICLE XII [11]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But

10. Ratification proclaimed January 8, 1798.
11. Ratification proclaimed September 25, 1804. Modified by the Twentieth Amendment.

in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. — The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII [12]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV [13]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV [14]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have

12. Ratification proclaimed December 18, 1865.

13. Ratification proclaimed July 28, 1868.

14. Ratification proclaimed March 30, 1870.

power to enforce this article by appropriate legislation.

ARTICLE XVI [15]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII [16]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII [17] [Repealed, See Article XXI]

Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

ARTICLE XIX [18]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XX [19]

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meetings shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

15. Ratification proclaimed February 25, 1913.
16. Ratification proclaimed May 31, 1913.
17. Ratification proclaimed January 29, 1919. Repealed by the Twenty-First Amendment.
18. Ratification proclaimed August 29, 1920.
19. Ratification proclaimed March 3, 1932.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

ARTICLE XXI [20]

Section 1. The eighteenth article of amendment of the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

ARTICLE XXII [21]

Section 1. No person shall be elected to the office of President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

20. Ratification proclaimed December 5, 1933.

21. Ratification proclaimed March 1, 1951.

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